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No. 07-(1)

In The Supreme Court of the United States

KEVIN DALE, *et al.*,

Petitioners,

v.

WHITE COUNTY, GEORGIA SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) In an action for damages under Title IX, the plaintiff must demonstrate that the defendant had "actual notice" of discrimination. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 292 (1998). Does "actual notice" mean:

(a) notice that a violation of the plaintiff's Title IX rights is occurring, or

(b) notice of a substantial risk that the plaintiff's Title IX rights are being or will be violated?

(2) In an action under 42 U.S.C. § 1983, in what circumstances may a supervisor be held liable for constitutional violations engaged in by his or her subordinate?

LIST OF PARTIES

The petitioners are (1) Kevin Dale, individually and as the next friend, natural parent and natural guardian of M.D., a minor child, (2) Abby Dale, individually and as the next friend, natural parent and natural guardian of M.D., a minor child, (3) Bryan Carlyle, individually and as the next friend, natural parent and natural guardian of A.C., a minor child, and (4) Lisa J. Carlyle, individually and as the next friend, natural parent and natural guardian of A.C., a minor child.

The respondents are the White County, Georgia School District, Donna Allegood, and Roger Fitzpatrick.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Kevin Dale, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 27, 2007.[1]

OPINIONS BELOW

The February 28, 2006, order of the District Court, which is not officially reported, is set forth at pp. 9-52 of the Appendix. The June 27, 2007 opinion of the Court of Appeals, which is unofficially reported at 2007 WL 1828943, is set forth at pp. 1-8 of the Appendix. The August 24, 2007 order of the Court of Appeals denying rehearing and rehearing en banc, which is not officially reported, is set forth at pp. 55-56 of the Appendix. The May 29, 2006, order of the Court of Appeals denying petitioners' motion to dismiss for lack of jurisdiction is set forth at pp. 53-54 of the Appendix.

[1] A related case arising out of the same events is the subject of a separate petition for certiorari. *Dale v. Stephens County Board of Education*, No. 07-___.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on June 27, 2007. A timely petition for rehearing was denied on August 24, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in pertinent part:

> No person . . . shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 1983 of 42 U.S.C. provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In September 2003 M.D. and A.C., then ten years old, were sexually molested by their fifth grade teacher, Joey Wilson. Petitioners, the parents of the two young girls, brought this action against the local school district and against the principal (Donna Allegood) and assistant principal (Roger Fitzpatrick) of the elementary school.[2] The plaintiffs alleged that the defendants had for two years largely ignored repeated complaints and warnings about sexually inappropriate conduct by Wilson directed at his young female students. The action sought relief against the school district under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and relief against the individual defendants under 42 U.S.C. § 1983.

There is no dispute that the girls were molested by Wilson. The only question is whether the respondent school board and the respondent principal and vice-principal can be held liable for the resulting injuries. The Eleventh Circuit held that the school board was not liable under Title IX, and that the individual respondents could not be held liable in an action under section 1983. The decision of the Eleventh Circuit rests on legal standards that sharply

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[2] The teacher, who was indicted and arrested for child molestation, died within a month of the molestation of M.D. and A.C.

conflict with the standards in nine circuits and which warrant review by this Court.

The Prior Complaints and Warnings

After a period of discovery, the defendants moved for summary judgment. The facts regarding the prior complaints and warnings are very much in dispute. The district court opinion sets out the facts in the light most favorable to the plaintiffs. (App. 11-18).

The plaintiffs adduced evidence that the defendants[3] had on at least seven occasions received complaints, warnings or reports of sexually inappropriate conduct by Wilson. All of this misconduct was directed at third grade girls, who would have been 8 or 9 years old at the time.[4]

The parents of one girl complained to Allegood that Wilson had improperly touched the upper thigh of their daughter H.C., and asked that she be transferred to a different teacher. (App. 15; R5-145-72).[5] Neither Allegood nor any other official of the school

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[3] All of the incidents in question were assertedly reported to Allegood. Only some of those matters were also reported to Fitzpatrick. Neither court below believed that those differences affected Fitzpatrick's potential liability.

[4] During his first two years at the elementary school, Wilson had taught the third grade. In September 2003, when he molested M.D. and A.C., Wilson was teaching (and the girls were in) the fifth grade.

[5] Citations to "R" are to the record on appeal in the Eleventh Circuit.

district investigated that incident or inquired whether other children might have had related problem with Wilson. None of the defendants reported the complaint to law enforcement officials or to the Georgia Professional Standards Commission, which licenses teachers. The child's parents themselves contacted a state agency, but it made "no substantial findings" before closing its inquiry. (App. 15). Eleventh months later, after M.D. and A.C. had also been molested, Wilson was indicted for molesting H.C.

Another parent, the mother of A.A., complained to the defendants that Wilson had directed the girls in his third grade class to remove their shoes so he could massage their feet, and had had the girls massage his feet and his shoulders. (App. 15 n.4; R5-152-19). The defendants did not investigate this complaint and took no action in response to it.

A different third grade girl, J.P., complained to a teacher that Wilson was touching her, playing with her hair, and giving her hugs. Both that teacher and the school counselor reported the problem to principal Allegood. (App. 14; R5-158-57). The defendants did not investigate this complaint and took no action in response to it.

A teacher warned the defendants that she had personally witnessed Wilson playing with and rubbing his fingers through the hair of girls in his third grade class. (App. 15 n.4; R5-158-46, 70). The defendants did not investigate this complaint and took no action in response to it.

An official from White County Mental Health, who was at the school to teach children a cautionary "Good Touch/Bad Touch" program, warned the school counselor that she was concerned about the manner in which Wilson was leaning over one of the girls. The counselor conveyed that warning to Principal Allegood. (App. 15 n.4). The defendants did not investigate this warning and took no action in response to it.

A teacher complained to Allegood that she had seen Wilson seated on the floor with third grade girls lying on Wilson's legs and crotch area. Although Allegood had personally witnessed this behavior, she did not investigate the matter and took no action in response to it. (App. 15 n.4; R5-160-par. 3-4; R5-158-45, 170-76).

A child in Wilson's third grade class went to the school nurse about a scratch on her neck, and, according to the Georgia Bureau of Investigations file, told that nurse that Wilson had instructed her not to reveal how the scratch had occurred. The nurse warned Principal Allegood about Wilson's action, but the defendants did not investigate the matter and took no action in response to it. (R5-148-55).

Finally, in September of 2003, Wilson molested M.D. and A.C. Wilson touched and cupped their breasts while in class, and rested his hand on their bottoms. Wilson particularly cupped the girls' breasts when they raised their hands to ask a question. (App. 16-17; R5-163-122; R5-168-66).

When the Carlyles learned about this misconduct from their daughter A.C., they had two meetings with Allegood; Allegood told the victim, A.C., that she must be mistaken about Wilson. (App. 16). Later that day A.C. told her friend and classmate M.D. about the meetings with Allegood. M.D. then told her mother that Wilson had been touching her own breasts and bottom, and that he had made a comment that her shirt showed off her curves. (App. 16). M.D.'s parents immediately called the sheriff's department. Within a week, Wilson was indicted on ten counts of child molestation, including the acts against A.C., M.D., H.C., and two other minors. Three weeks after the indictments, school officials formally suspended Wilson and initiated the process of terminating his contract. In lieu of terminating Wilson's contract, the school board permitted Wilson to resign. (App. 18).

In light of this evidence of unsuccessful earlier complaints, reports and warnings about Wilson's conduct, the district court denied the defendant's motion for summary judgment. The district judge concluded that "the cumulative effect of these complaints should have placed Allegood on notice that Wilson was engaging in sexually inappropriate conduct with his students." (App. 26). "[T]he court finds that [the plaintiffs] have established that Allegood, a supervisor with authority to take corrective action, was placed on notice of Wilson's bad conduct and failed to adequately respond." (App. 27). "[T]he evidence presented by plaintiffs indicates that Allegood was on notice that Wilson was sexually abusing his

students and that her inadequate response constituted deliberate indifference to plaintiffs' rights." (App. 31).[6] Despite the particularly serious complaint regarding H.C.,

> [t]he school district . . . made no independent investigation to determine whether Wilson was touching other students. The district also failed to follow up with H.C. or to continue to monitor Wilson for further indiscretions. Also, there is no evidence of any investigations or corrective measure taken regarding any of the earlier complaints.

(App. 27).

The district court reasoned that these circumstances were sufficient to establish liability on the part of the defendants. Specifically, the court concluded that the complaints to Allegood were sufficient to satisfy the requirement in *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998), that the plaintiff in a Title IX action show that an appropriate school official had "actual notice" and was deliberately indifferent to it. (App. 22-27). That same notice, the district court held, was sufficient in an action

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[6] "Plaintiffs have presented similar evidence showing that Fitzpatrick was also on notice of Wilson's misconduct and that he likewise acted with deliberate indifference." (App. 31). "[T]hese escalating complaints alleged by plaintiffs constitute widespread abuse sufficient to notify Allegood and Fitzpatrick of the need to stop Wilson's misconduct and that Allegood and Fitzpatrick failed to do so." (App. 31).

under section 1983 to render Allegood and Fitzpatrick personally liable for having failed to take steps to investigate or control Wilson, and precluded those defendants from establishing qualified immunity. (App. 29-33).

The court of appeals reversed.[7] With regard to the Title IX, the Eleventh Circuit held that the notice requirement of *Gebser* required that the school board have "actual notice that Wilson was molesting students." (App. 7). The repeated notice provided to Allegood over a period of years regarding Wilson's misconduct did not meet that definition. Some of the abusive conduct fell short of "molesting," and even the notice regarding the touching of H.C. – conduct which led to a molesting indictment of Wilson – was not notice contemporaneous with the molestation of the plaintiff's daughters; it was only notice that Wilson *had* molested a student. That holding was consistent with the earlier Fourth Circuit interpretation of *Gebser* in *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001).

With regard to the claims against Allegood and Fitzpatrick as individuals, the court of appeals held that in an action under section 1983 a supervisor

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[7] The individual defendants took an interlocutory appeal from the decision of the district court because it denied their assertion of qualified immunity. In its order filed May 23, 2006, the court of appeals concluded that it had pendent appellate jurisdiction over the related Title IX appeal of the school district. (App. 53-54).

ordinarily is liable for constitutional violations by a subordinate only if the supervisor "knew that the subordinate[ ] would act unlawfully." (App. 7). Allegood and Fitzpatrick, the Eleventh Circuit reasoned, could not be certain that Wilson was going to molest petitioner's children. Awareness of a substantial risk that a subordinate would violate the Constitution, the court of appeals held, cannot provide a basis for supervisory liability unless there is "'a history of widespread abuse' that is 'obvious, flagrant, rampant and of continued duration.'" (App. 5) (*quoting Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990)). The misconduct that preceded the molestation of the plaintiffs' children was neither widespread (there was only a single molester) nor "rampant" and "of continued duration" (the inappropriate touching was intermittent), and much of the misconduct, the panel may have felt, was not bad enough to be "flagrant."

REASONS FOR GRANTING THE WRIT

I. THERE IS A WELL ESTABLISHED AND COMPLEX INTER-CIRCUIT CONFLICT REGARDING WHEN IN AN ACTION UNDER 42 U.S.C. § 1983 A SUPERVISOR MAY BE HELD LIABLE FOR A CONSTITUTIONAL VIOLATION BY HIS OR HER SUBORDINATE

This case presents one of the most important unresolved issues in federal civil rights litigation: in an action under 42 U.S.C. § 1983, when can a

supervisor be held liable for a constitutional violation committed by a subordinate? The dispute about the standard governing supervisory liability is both widespread and longstanding. There are literally thousands of decisions in the lower courts regarding this issue.[8] Every one of the geographical circuits has adopted some standard for determining supervisory liability. In most federal court of appeals there are dozens of opinions addressing this question.

This recurring question is exceptionally important. Section 1983 is the vehicle through which federal constitutional rights, and rights under many federal statutes, are enforced against state and local government officials. This Court on numerous occasions has granted certiorari to resolve questions regarding when various defendants can be held liable in section 1983 actions. The Court has addressed the liability under section 1983 of cities,[9] states,[10] local legislators,[11]

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[8] A Westlaw search for "supervisory liability" and "section 1983" lists 3792 decisions in the federal courts in which both phrases appear, none of them in this Court. This is far from a complete listing of cases on this issue, because the phrase "supervisory liability" is not utilized in all cases involving this problem, and tends to be less common in older cases. There were 815 such decisions in the year between November 17, 2006 and November 17, 2007.

[9] *E.g.*, *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

[10] *E.g.*, *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

[11] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

prosecutors,[12] public defenders,[13] and judges,[14] and has repeatedly considered when executive officials enjoy qualified immunity in such litigation.[15] No decision of this Court, however, has ever addressed, or provided the lower courts with guidance regarding, the issue in the instant case.

In the absence of guidance from this Court, an exceptionally complex inter-circuit conflict has emerged among the courts of appeals. There are at least half a dozen distinct standards in the circuit courts, involving overlapping differences as to (a) the type of information the supervisor had about the subordinate's actions and propensities, (b) the conclusions the supervisor had or should have drawn from that information, and (c) the intent or degree of care with which the supervisor acted or chose not to act.

A. The Standard in the First, Second, Fourth and District of Columbia Circuits: Deliberate Indifference to Notice or Constructive Knowledge of a Risk of Constitutional Violation by Subordinate

In the First, Second, Fourth, and District of Columbia Circuits, unlike the Eleventh Circuit,

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[12] *E.g.*, *Imbler v. Pachtman*, 424 U.S. 409 (1976).

[13] *Polk County v. Dodson*, 545 U.S. 312 (1981).

[14] *Stump v. Sparkman*, 435 U.S. 349 (1978).

[15] *E.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002).

supervisory liability can be based on a showing of deliberate indifference to a risk (not a certainty) of a constitutional violation by a subordinate. These circuits do not require that the supervisor actually realized that there was such a risk; in these four circuits it is sufficient that the supervisor was on notice of or had constructive knowledge of the danger. Even among the First, Second, Fourth and District of Columbia Circuits, however, there are significant differences.

In the First Circuit the key issue is not (as in the Fifth and Tenth Circuits) whether the supervisor had in fact concluded that a subordinate was likely to violate the constitution, but only whether the supervisor was on notice of facts from which that conclusion should have been drawn.

> Notice is a salient consideration in determining the existence of supervisory liability. *See Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 93 (1st Cir. 1994) (treating as "[a]n important factor . . . whether [the] supervisor was put on notice of behavior that was likely to result in the violation of constitutional rights"). . . . [S]upervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he "may be liable for the foreseeable consequences of such conduct if he would have known it but for his . . . willful blindness." *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994)

Camilo-Robles v. Hoyos, 151 F.3d 1, 7 (1st Cir. 1998). *See Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d at 93 ("notice" of "likely violation" "an important factor") (opinion joined by Breyer, J.); *Rogan v. Menino*, 175 F.3d 75, 78 (1st Cir. 1999) ("[t]o a significant extent, the existence of [supervisory liability] depends on the presence or absence of notice."); *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d at 582 (liability may attach "[w]hen the supervisor is on notice."); *Malek v. Knightly*, 1995 WL 338178 *3 (1st Cir. June 5) ("no liability where supervisor was not provided with requisite notice of behavior which was likely to result in constitutional violation.").

In the Second Circuit a supervisor is liable for constitutional violations by a subordinate if the supervisor "knew or should have known that there was a high degree of risk" of such a constitutional violation. *Poe v. Leonard*, 282 F.3d 123, 142 (2d Cir. 2002). Risk of constitutional violation, not certainty, is the standard; it is sufficient that the "subordinate was prone to commit some unconstitutional . . . behavior." 282 F.3d at 141. The supervisor need not have actually concluded that that risk existed; he or she need only be "on notice" about the problem. 282 F.3d at 141 ("on notice," "reason to suspect"), 142 (supervisor "should have known"), 144 ("on notice," "should have been aware"). Unlike the First Circuit, which requires only proof that a constitutional violation was "likely," the Second Circuit requires a showing that there was a "high degree of risk." 282 F.3d at 140, 141. The Second Circuit standard, however, is less

demanding in one other respect; the supervisor need not have actual notice of the relevant information, only "constructive notice." "Such notice could be actual (for example, awareness of prior deprivations in a related context) or it could be constructive (for instance, notice arising from a preexisting duty)." 282 F.3d at 141; *see* 282 F.3d at 143 ("We . . . have . . . found the existence of constructive notice dispositive.").

In the Fourth Circuit supervisory liability can be based on the existence of a "pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff." This is more demanding than the First Circuit standard ("likely") and different from the Second Circuit standard ("high degree of risk"). Unlike the Third, Fifth and Tenth Circuits, the Fourth Circuit does not require actual knowledge of that risk; "constructive knowledge" will do.[16]

The District of Columbia Circuit requires a plaintiff to show that the danger of a future constitutional violation is "highly likely," clearly a more demanding standard than merely "likely." *International Action Center v. United States*, 365 F.3d 20, 25,

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[16] *Moore v. Greenwood School Dist. No. 52*, 195 Fed. Appx. 140, 144 (4th Cir. 2006) ("actual or constructive knowledge" of "a pervasive and unreasonable risk"); *Mikkelsen v. DeWitt*, 141 Fed. Appx. 88, 91 (4th Cir. 2005) (same); *Turner v. Kight*, 121 Fed. Appx. 9, 14 (4th Cir. 2005) (same); *Tigrett v. Rector and Visitors of the University of Virginia*, 290 F.3d 620, 630 (4th Cir. 2002) (same); *Cruden v. Brinkley*, 1999 WL 152597 *4 (4th Cir. 1999) (same); *Carter v. Morris*, 164 F.3d 215, 220-21 (4th Cir. 1999) (same).

26 (D.C. Cir. 2004) (opinion by Roberts, J.). The supervisor (unlike the rule in the Third, Fifth and Tenth Circuits) can be held liable based on "constructive knowledge." 365 F.3d at 28; *see* 365 F.3d at 25 (supervisor "should have been aware.") Unlike most circuits, the District of Columbia Circuit holds that knowledge (actual or constructive) of that risk must be based on a "prior history" or "pre-existing pattern" of "past transgressions," 365 F.3d at 26-27. That rule is inconsistent with the law in most circuits; in *Kahle v. Leonard*, 477 F.3d 544 (8th Cir. 2007), for example, the Eighth Circuit held a supervisor liable because he knew that a deputy sheriff posed a risk to a female inmate whom he ultimately raped, even though the deputy had no prior history of sexual or other misconduct.[17] This District of Columbia Circuit requirement is analogous to, but far less stringent than, the Eleventh Circuit five-part requirement. *See* pp. 23-25, *infra*.

B. The Standard in the Third, Fifth and Tenth Circuits: Deliberate Indifference to a Known Risk of Constitutional Violation by Subordinate

In the Third, Fifth and Tenth Circuits, the threshold standard for establishing supervisory liability is a different one; the supervisor must

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[17] The supervisor knew that the deputy had visited the inmate's cell after lockdown. 477 F.3d at 552.

actually *know* that there is a substantial risk the subordinate will engage in a constitutional violation and act with deliberate difference to that risk. Where that knowledge exists, the supervisor will be liable if he or she is deliberately indifferent in responding to the problem.

In the Third, Fifth and Tenth Circuits, unlike the first of the Eleventh Circuit standards, the plaintiff need not prove the supervisor knew the subordinate "would" violate the Constitution; knowledge of a substantial risk is sufficient. *Serna v. Colorado Dept. of Corrections*, 455 F.3d 1146, 1154-55 (10th Cir. 2006) ("substantial risk"); *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) ("substantial risk"); *Atteberry v. Nocona General Hospital*, 430 F.3d 245, 254-55 (5th Cir. 2005) ("substantial risk of serious harm," "known and excessive risk", "significant risk"); *Brown v. Muhlenberg Township*, 269 F.3d 205, 216 (3d Cir. 2001) ("unreasonable risk"); *Johnson v. Martin*, 195 F.3d 1208, 1219 (10th Cir. 1999) ("serious risk"); *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998) ("substantial risk of harm"); *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) ("substantial risk"); *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997) ("substantial risk"); *Sample v. Diecks*, 885 F.3d 1099, 1118 (3d Cir. 1989) ("unreasonable risk").

On the other hand, in these three circuits it is not sufficient to prove that a supervisor *should* have recognized the danger, or that he or she was merely "on notice" of that risk. The official must "be aware of

facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Smith v. Brenoettsy*, 158 F.3d at 912 (*quoting Farmer v. Brennan*, 511 U.S. 825, 837 (1994)); *Serna v. Colorado Dept. of Corrections*, 455 F.3d at 1154-55 (*quoting Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003)); *Brown v. Muhlenberg Township*, 269 F.3d at 216 ("plaintiff must . . . show . . . the supervisor was aware that this unreasonable risk existed."). Liability cannot be based on "an official's failure to alleviate a significant risk that he should have perceived but did not." *Atteberry v. Nocona General Hospital*, 430 F.3d at 255 (*quoting Farmer v. Brennan*, 511 U.S. 825, 838 (1994)). The existence of that knowledge can at times be inferred from the circumstances that had been made known to the supervisor. *Bradley v. Puckett*, 157 F.3d at 1025; *Woodward v. City of Worland*, 977 F.2d 1392, 1399 n.10 (10th Cir. 1992). Unlike the Eleventh Circuit, which applies its stringent five-part standard, neither the Third, Fifth or Tenth Circuits have established any particular requirement as to the type of circumstantial evidence that might prove that a supervisor was in fact aware of the risk that a subordinate might engage in a constitutional violation.

The standard for supervisory liability in the Third, Fifth and Tenth Circuits is thus more demanding than the standard in the First, Second, Fourth and District of Columbia Circuits, but less demanding

than the standard in the Sixth, Seventh and Eleventh Circuits.

C. The Seventh Circuit Standard: Knowledge and Approval of Subordinate's Action

The Seventh Circuit standard for supervisory liability is the most stringent. Decisions in that circuit require, first, that the plaintiff show that the supervisor actually *knew* that his or her subordinate was violating or had violated federal rights.[18] This knowledge requirement itself imposes major limitations on the potential liability of a supervisor. A supervisor cannot be held liable based on the known risk, however great, of a future constitutional violation. Indeed, until at least one violation has already occurred, there is not yet any violation to know about. A supervisor cannot be held liable merely because he or she should have known of the violation, but refused, for example, to inquire about what the subordinate was doing, or to look into complaints about the subordinate's conduct. If the supervisor had received information from which a reasonable person would have concluded that the subordinate was violating federal rights, the supervisor still is not liable so long as he or she, however pig-headedly, did not draw that inference.

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[18] *See* nn.19-21, *infra*.

The Seventh Circuit also requires a plaintiff to meet a second requirement; there are several distinct lines of Seventh Circuit cases which articulate this additional element somewhat differently. Several decisions require proof that the supervisor actually "approved"[19] of the unconstitutional action of his or her subordinates; these decisions insist on evidence that the supervisor had indicated that he or she regarded that action favorably. A second set of cases holds that the supervisor is liable for a known constitutional violation only if he or she "consented"[20] to that conduct. This formulation requires that the supervisor have given permission for the unconstitutional action, although not necessarily agreeing with it. A third group of decisions holds the supervisor liable if he or she both knew about the conduct and "facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what [he or she] might see."[21]

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[19] *Sides v. City of Champaign*, 496 F.3d 820, 828 (7th Cir. 2007); *Williams v. Prison Health Services, Inc.*, 167 Fed. Appx. 555, 558 (7th Cir. 2006); *Chavez v. Cady*, 207 F.3d 901, 906 (7th Cir. 2000); *Baskin v. City of Des Plaines*, 138 F.3d 701, 705 (7th Cir. 1998).

[20] *Johnson v. Peek*, 1998 WL 764434 *3 (7th Cir. 1998); *Hadley v. Peters*, 1995 WL 675990 *9 (7th Cir. 1995); *Riggins v. Walter*, 279 F.3d 422, 426 (7th Cir. 1985); *Douglas v. Black*, 1995 WL 237027 *1 (7th Cir. 1995); *Clayton-El v. Clark*, 1994 WL 709323 *4 (7th Cir. 1994); *Walker v. Ahitow*, 1993 WL 468603 *6 (7th Cir. 1993); *Lucien v. Peters*, 1992 WL 104815 *2 (7th Cir. 1992).

[21] *Steidl v. Fermon*, 494 F.3d 623, 631 (7th Cir. 2007); *Thomas v. Knight*, 196 Fed. Appx. 424, 426 (7th Cir. 2006); *Nanda v. Moss*, 412 F.2d 836, 842 (7th Cir. 2005); *Morfin v. City*

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This is somewhat less restrictive than the approval line of Seventh Circuit cases, because a supervisor might turn a blind eye to known federal violations, not because the supervisor approved them, but only because the supervisor was simply indifferent to whether the violations were occurring, or because the supervisor – although disapproving those violations – just did not want to do anything about them.

D. The Sixth Circuit Standard: Approval of or Knowing Acquiescence in Subordinate's Action

Decisions in the Sixth Circuit use a fairly consistent formula to define when a supervisor is liable for the constitutional violations of a subordinate. The supervisor must "at least implicitly [have] authorized,

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of East Chicago, 349 F.3d 989, 1000 (7th Cir. 2003); *Hildebrandt v. Illinois Dept. of Natural Resources*, 347 F.3d 1014, 1039 (7th Cir. 2003); *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001); *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Adams v. Detella*, 2000 WL 1763342 *4 (7th Cir. 2000); *Jones v. Adank*, 2000 WL 868591 *3 (7th Cir. 2000); *Zentmyer v. Kendall County, Ill.*, 220 F.3d 805, 811 (7th Cir. 2000); *Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999); *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1987); *Lanigan v. Village of East Hazel Crest, Ill.*, 110 F.3d 467, 477 (7th Cir. 1997); *Robinson v. Welborn*, 1997 WL 58868 *1 (7th Cir. 1997); *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1182 (7th Cir. 1994); *Del Raine v. Williford*, 32 F.3d 1024, 1052 (7th Cir. 1994); *Jones v. City of Chicago*, 856 F.2d 985, 991 (7th Cir. 1988).

approved, or knowingly acquiesced in the unconstitutional conduct."[22] This formula is similar to the third variant of the second part of the Seventh Circuit test. Like all versions of the Seventh Circuit standard, the Sixth Circuit standard is more stringent than the standards in the First, Second, Third, Fourth, Fifth, Tenth and District of Columbia Circuits.

E. The Eleventh Circuit Standards

As the panel decision in the instant case noted, the Eleventh Circuit limits supervisory liability to three circumstances.[23]

(1) A supervisor is liable if he or she "knew the subordinates would act unlawfully and failed to stop them from doing so." (App. 5) (*quoting Dulrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003). Like the Sixth or Seventh Circuits, this standard requires

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[22] *Ontha v. Rutherford County, Tennessee*, 222 Fed. Appx. 498, 504 (6th Cir. 2007); *Caudell v. City of Loveland*, 226 Fed. Appx. 479, 482 (6th Cir. 2007); *DeMerrell v. City of Cheboygan*, 206 Fed. Appx. 418, 420 (6th Cir. 2006); *Turner v. City of Taylor*, 412 F.3d 629, 643 (6th Cir. 2005); *Doe v. City of Roseville*, 296 F.3d 431, 440 (6th Cir. 2002); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999); *Doe v. Claiborne County, Tennessee*, 103 F.3d 495, 511 (6th Cir. 1996); *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982).

[23] Like other circuits, the Eleventh Circuit imposes liability on a supervisor who directs a subordinate to violate the Constitution. (App. 5). Such a direction is generally regarded as direct participation in the constitutional violation at issue.

knowledge of the subordinate's constitutional violation. Unlike those circuits, however, affirmative approval, authorization, consent or acquiescence is not required; if a supervisor knows that a supervisor is ongoing to violate the Constitution, the supervisor is liable for failing to stop them (or, presumably, making a reasonable effort to do so). A supervisor who makes an inadequate effort to do so is liable in the Eleventh Circuit even though he or she did not "turn a blind eye" to the problem (the Seventh Circuit standard) or "tacitly acquiesce" (the Sixth Circuit standard). This Eleventh Circuit standard, unlike the standards in a majority of circuits, requires that the supervisor *know* that a violation is actually going to occur;[24] mere knowledge of a substantial danger of unconstitutional action by a subordinate is not sufficient.

(2) A supervisor can be liable if he or she "had notice" of a "threat" of constitutional violations, but only if the notice took the form of " 'a history of widespread abuse' that is 'obvious, flagrant, rampant and of continued duration.' " (App. 5) (*quoting Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990)). The Eleventh Circuit has repeatedly emphasized that unless this exceptional pattern of past violations was present, liability cannot be imposed on a supervisor based on notice of a risk of constitutional violation. In this case the district court had concluded that the

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[24] *See* App. 5 (individual defendants not liable because they did not "kn[o]w Wilson would abuse students.").

individual supervisor defendants were on notice that Wilson posed a danger to his female students. (App. 31). The Eleventh Circuit did not disturb or question that finding. Rather, it held that the supervisors were not liable because the plaintiffs had failed to also show that the defendants received that "notice . . . through a history of obvious, flagrant, and widespread abuse of students by Wilson." (App. 5).

This five-part requirement – that the notice provided to a supervisor must concern prior misconduct that was "widespread," "obvious," "flagrant," "rampant," and "of continued duration" – does not exist in any other circuit. The Eleventh Circuit has repeatedly admonished that the standard is meant to be "extremely rigorous."[25] No Eleventh Circuit decision in the last decade has found the evidence sufficient to satisfy this stringent standard or permitted the imposition of liability based on notice of a danger of constitutional violations.[26] As a practical matter, in the

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[25] *West v. Tillman*, 496 F.3d 1231, 1329 (11th Cir. 2007); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003); *Brady v. Florida Dept. of Labor and Emp. Security*, 133 F.3d 797, 802 (11th Cir. 1998).

[26] *Hicks v. Ferrero*, 2007 WL 1793446 *3 (11th Cir. 2007) (standard not met); *West v. Tillman*, 496 F.3d 1231, 1329 (11th Cir. 2007) (standard not met); *McBride v. Rivers*, 170 Fed. Appx. 648, 658 (11th Cir. 2006) (standard not met); *Gray v. Bostic*, 458 F.3d 1295, 1308 (11th Cir. 2006) (standard not met); *Sanders v. Barrett*, 2005 WL 2640979 *2 (11th Cir. 2005) (standard not met); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (standard not met); *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003) (standard not met); *Hartley v. Parnell*, 193 F.3d 1263,

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Eleventh Circuit (unlike the circuits discussed below) it is virtually impossible to establish supervisory liability based on notice that a subordinate is likely to engage in a violation of constitutional rights.

(3) A supervisor will be held liable if he or she "imposed an improper custom or policy that constituted deliberate indifference to constitutional rights." (App. 5-6). This basis of liability is effectively limited to high level policymaking officials.

F. The Eighth and Ninth Circuits Apply Inconsistent Standards

The complex conflicts described above all exist *within* the Eighth and Ninth Circuits.

In *Ottoman v. City of Independence, Missouri*, 341 F.3d 751, 761 (8th Cir. 2003), the court quoted with approval the Seventh Circuit decision in *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988), requiring proof that the supervisor "kn[e]w about the conduct" of the subordinate. But in *Kahle v. Leonard*, 477 F.3d 544 (8th Cir. 2007), the Eighth Circuit disavowed any such knowledge requirement in *Ottoman*, dismissing it as "casual dicta." 477 F.3d at 552. "[The defendant supervisor] did not have to know that [the plaintiff] was being sexually assaulted, but

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1269 (11th Cir. 1999) (standard not met); *Daniel v. United States Marshall Service*, 188 Fed. Appx. 954, 963 (11th Cir. 2006) (standard not met); *Brady v. Florida Dept. of Labor and Emp. Security*, 133 F.3d 797, 802 (11th Cir. 1998) (standard not met).

only that she was at substantial *risk* of being sexually assaulted." 477 F.3d at 551 (emphasis in original).

Wever v. Lincoln County, Neb., 388 F.3d 601, 608 (8th Cir. 2004), held that supervisory liability could be based on the fact that a supervisor was "on notice" of the risk of a constitutional violation. But in *Kahle* the Eighth Circuit held to the contrary that the supervisor "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 477 F.3d at 550.

In *Larson v. Miller*, 76 F.3d 1446, 1453 (8th Cir. 1996), the court held that supervisory liability requires proof of "a continuing, widespread, persistent pattern of unconstitutional conduct," the same standard applied to determine the existence of a custom giving rise to governmental liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Less than a year later, however, the Eighth Circuit reversed itself and held that the *Monell* standard did *not* apply to claims against supervisors; evidence that a supervisor was "aware of a pattern of problems" is sufficient even where the pattern is not "persistent and widespread." *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996). Then in *Kahle* the Eighth Circuit held that the supervisor could be liable even in the absence of any pattern of unconstitutional misconduct.

With regard to the level of risk of constitutional violation that must be shown, *White v. Holmes*, 21

F.3d 277, 280 (8th Cir. 1994), required "a pervasive and unreasonable risk of harm," *Pietrafeso v. Lawrence County, S.D.*, 452 F.3d 978, 983 (8th Cir. 2006), required a "substantial risk of serious harm," and then *Cox v. Sugg*, 484 F.3d 1062, 1066 (8th Cir. 2007), required only "a risk of constitutional harm."

Similarly, decisions in the Ninth Circuit apply several quite different standards. *See, e.g.*, *Oona, R.S. v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998) ("A supervisor may be found liable under § 1983 if the supervisor is 'aware of a specific risk of harm to the plaintiff.'"); *Harry A. v. Duncan*, 234 Fed. Appx. 463, 464 (9th Cir. 2007) (supervisor will be liable if he or she has "actual knowledge (or, at least, willful blindness)" regarding a "serious risk"); *Earthly v. City of Beverly Hills*, 125 F.3d 858, 1997 WL 632594 *2 (9th Cir. 1997) ("a supervisor could not act with deliberate indifference to a plainly obvious risk of a constitutional violation"); *Edgerly v. City and County of San Francisco*, 495 F.3d 645, 660 (9th Cir. 2007) (supervisory liability based on "reckless or callous indifference to the rights of others"); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (liability only where the supervisor "knew of the violations and failed to act to prevent them.")

* * *

Decades of lower court litigation of this issue have framed a mature and complex inter-circuit conflict. The numerous of circuit court decisions have fully aired the subsidiary questions, and the

innumerable fact patterns in which the issue has arisen have brought to light the potential alternative legal standards and demonstrated the significance of each.

The instant case provides an excellent vehicle for addressing the standard for supervisory liability in a section 1983 case. This is precisely the type of case in which the differing liability standards are outcome determinative. The supervisor defendants did not have actual knowledge that Wilson was molesting the young girls in his class, and concededly could not be certain he would do so in the future. If the Court were to hold that such knowledge or certainty is required for supervisory liability, the claims against the individual defendants in this case were properly dismissed. On the other hand, a reasonable jury assuredly could conclude that those defendants had actual or constructive knowledge that Wilson had a propensity for improper sexual conduct with young girls, and therefore posed a substantial risk to the girls in his class. If this Court were to adopt the risk-based liability standard used in the majority of the courts of appeals[27], the claims against the supervisor defendants in this case would be reinstated.

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[27] As we note *supra*, decisions adopting a standard quite different from the Eleventh Circuit standard in the instant case were joined or written by the Chief Justice and Justice Breyer when they served, respectively, on the District of Columbia and First Circuits.

The Eleventh Circuit standard for supervisory liability in section 1983 cases is inconsistent with the language of section 1983 itself. Section 1983 imposes liability on a person who "causes" a deprivation of constitutional rights. A supervisor who is on notice that a subordinate under his or her control poses a substantial risk of engaging in unconstitutional conduct, and who fails to take reasonable steps to prevent that conduct, can fairly be said to have caused the resulting constitutional violation. That standard is consistent with tort principles that were well established when section 1983 was enacted. An individual who is on notice that his or her property (for example, a car or a pet) poses a substantial risk to third parties is liable in tort if he or she fails to take reasonable steps to prevent those injuries. Liability standards under section 1983 are resolved in light of the prevailing tort law context in which that provision was adopted in 1871. *E.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 49-51 (1998).

II. THERE IS A WELL ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHAT CONSTITUTES "ACTUAL NOTICE" UNDER *GEBSER V. LAGO VISTA INDEP. SCHOOL DISTRICT*, 524 U.S. 274 (1998)

Title IX prohibits recipients of federal funds from discriminating on the basis of sex in any federally assisted education program or activity. The sexual harassment or molestation of a student by a school official in such a program or activity constitute such

forbidden discrimination. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 281 (1998). In *Gebser* this Court addressed the standard governing when a recipient of federal funds can be held liable in damages for discrimination violative of Title IX. *Gebser* held that damages may only be awarded if a plaintiff demonstrates that the defendant had "actual notice" and acted with deliberate indifference. 524 U.S. at 292.

In the decade following *Gebser* the courts of appeals have reached sharply divergent conclusions regarding the meaning of this "actual notice" requirement. Two circuits, including the Eleventh Circuit in the instant case, hold that defendant must have had notice of the specific type of misconduct that is the basis of the damage claim; actual notice of different, perhaps less egregious, types of discrimination is insufficient. That notice, moreover, must be received at the point in time when the misconduct is actually occurring; actual notice of prior discrimination will not support a damage action. Four other circuits hold, to the contrary, that actual notice of prior, even less egregious discrimination can be sufficient under *Gebser* if that notice demonstrated the existence of a substantial risk of the abuse that was subsequently suffered by the plaintiff.

The Fourth Circuit adopted a narrow reading of the *Gebser* "actual notice" requirement in *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001). A teacher in that case had molested a sixth grade boy, whose parents brought suit under Title IX. The court of

appeals acknowledged that there was ample evidence that the elementary school principal already knew, before that child was victimized, that the teacher was a danger to the students. A former student had personally informed the principal that the teacher in question had molested him more than a decade before, and warned the principal that the teacher was a pedophile. 268 F.3d at 233. A second person told the principal that the teacher had molested an unidentified student. The teacher "frequently took male students on camping trips at which no other adults were present." 268 F.3d at 235. The teacher had been seen with the plaintiffs' son sitting in his lap in a questionable posture. 268 F.3d at 233. The Fourth Circuit agreed that this information provided ample notice that the teacher posed "an unreasonable risk" of sexual abuse to his students. 268 F.3d at 235.

The court of appeals nonetheless overturned a jury verdict against the school district under Title IX.

> Although [the principal] certainly should have been aware of the *potential* for such abuse, . . . there is no evidence in the record to support a conclusion that [the principal] was *in fact* aware that a student was being abused.

268 F.3d at 238 (emphasis in original). In the view of the Fourth Circuit, *Gebser* required proof that the responsible school official actually knew that at least some student was being molested at the point in time when the plaintiff's son was being victimized. It was insufficient under Title IX that the principal knew

that the teacher had molested other students, that the teacher at the time was acting in a suspicious manner, or that the teacher posed a serious risk to his young students.

The Eleventh Circuit in the instant case read *Gebser* in a similarly narrow manner. To satisfy the "actual notice" requirement, the court below held, plaintiffs were required to show that the school principal "had actual notice Wilson was molesting students." (App. 7). As in the Fourth Circuit, actual notice that Wilson had repeatedly engaged in objectionable conduct short of actual molestation and that Wilson posed a substantial danger to his students was deemed insufficient. The court below did not dispute the district judge's finding that the principal was "on notice that Wilson was engaging in sexually inappropriate conduct with his students." (App. 31). Rather, the Eleventh Circuit regarded that finding as legally irrelevant, because the principal was only on notice of "sexually inappropriate conduct," not of sexual molestation.

The Tenth Circuit has recognized that "[l]ower courts differ on whether notice sufficient to trigger liability may consist of prior complaints or must consist of notice regarding current harassment [or other violations] in the recipient's programs." *Escue v. Northern Oklahoma College*, 450 F.3d 1146, 1153

(10th Cir. 2006).[28] The Tenth Circuit rejected the Fourth Circuit decision in *Baynard* requiring actual knowledge of the very discriminatory act in question.

> *Gebser* . . . " . . . does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student." *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999).

450 F.3d at 1153. The notice requirement in *Gebser* is satisfied in the Tenth Circuit when school officials have "actual knowledge of a *substantial risk* of abuse to students based on prior complaints by other students." *Id.* (*quoting Doe A. v. Green*, 298 F. Supp. 2d 1025, 1033 (D. Nev. 2004) (emphasis in *Escue*).

In *Bostic v. Smyrna School Dist.*, 418 F.3d 355 (3d Cir. 2005), the Third Circuit approved a Title IX jury instruction that embodied this substantial danger standard.

> An educational institution has "actual notice," . . . if an appropriate person at the institution has knowledge of facts sufficiently indicating substantial danger to a student so that the institution can reasonably be said to be aware of the danger.

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[28] *See Johnson v. Galen Health Institutes, Inc.*, 267 F. Supp. 2d 679, 686 (W.D. Ky. 2003) ("Lower courts have split on this question); *Doe A. v. Green*, 298 F. Supp. 2d 1025, 1033 n.2 (D. Nev. 2004) (describing Fourth Circuit decision in *Baynard* as the "minority view.")

418 F.3d at 360. The court of appeals noted that the model federal jury instruction regarding Title IX claims also provides that notice of facts "sufficiently indicating danger to students" is sufficient under *Gebser*. 418 F.3d at 316 (citing 3C Fed. Jury Prac. & Instr. § 177.36 (5th ed. 2001)).

> Although the "substantial danger" language does not appear in [*Gebser* or *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)], neither is it inconsistent with the standard set forth in those cases regarding "actual knowledge." . . . We therefore reject [the] contention that . . . the "substantial danger" language [is] no longer validly applied to Title IX.

Id.

In *Williams v. Paint Valley Local School District*, 400 F.3d 360 (6th Cir. 2005), the Sixth Circuit upheld a disputed jury instruction which stated that the school district could be held liable if it "had actual notice that [the teacher] posed a substantial risk of sexual abuse to children in the school district." 400 F.3d at 363. "The idea was to make clear that 'deliberate indifference' liability could not rest on actual or constructive knowledge of an inconsequential risk." 400 F.3d at 368. The Tenth Circuit reasoned that notice of a "substantial risk" is sufficient because that standard was used by this Court to define deliberate indifference in *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). 400 F.3d at 367-68.

In *Warren v. Reading School Dist.*, 278 F.3d 163 (3d Cir. 2002), the Third Circuit upheld a finding of actual notice under *Gebser* under circumstances all too similar to the instant case. In *Warren* the elementary school principal had earlier received, and ignored, a parent's complaint that a teacher was taking his young son to the teacher's house, lifting him "up and down," and giving him money. 278 F.3d at 166. The principal took no action. Two years later that teacher was arrested for a related form of physical contact with fourth grade male students that constituted sexual abuse; one of the victims sued under Title IX. In upholding a jury verdict against the school district under Title IX, the Third Circuit held that the earlier parental complaint – although it concerned troubling conduct that was not itself sexual abuse – would alone satisfy the *Gebser* knowledge requirement. 278 F.3d at 173. In the Fourth and Eleventh Circuits the claim in *Warren* would have been dismissed, because the principal did not actually know that the plaintiffs' son was being molested.

The Seventh Circuit has adopted an intermediate reading of *Gebser*. Ordinarily

> the plaintiff in a Title IX damages suit based on a teacher's behavior must prove actual knowledge of misconduct, not just actual knowledge of the risk of misconduct.

Delgado v. Stegall, 367 F.3d 668, 672 (7th Cir. 2004). It is not enough that "school[ ] officials know in a general sense that there is a *risk* that one or more . . .

teachers will harass a student sexually, even if no such incident has ever occurred in the school." *Id.* (emphasis in original). But notice of past behavior demonstrating a risk of sexual abuse, harassment, or other discrimination will suffice if it reveals "*so* high a risk [of such discrimination that it] would make [the recipient] reckless for having failed to take steps to prevent [subsequent misconduct]." *Id.* (emphasis in original). In the instant case a trier of fact could reasonably conclude that school officials acted recklessly when, despite receiving two years of repeated complaints and warnings about Wilson, they took no action to prevent the sexual molestation that ultimately occurred in September 2003.

This inter-circuit conflict stems in part from the language in *Gebser* itself. Although *Gebser* required "actual notice," it left unclear notice *of what*. *Gebser* refers frequently to notice of "*the* discrimination" or "*the* violation," assuming that there would be only a single type, period and victim of discrimination. 524 U.S. at 287-90 (emphasis added). Some passages simply require "notice," with no additional modifiers indicating the necessary content of the notice. 524 U.S. at 285, 287-89, 291, 292. The Court held that the notice that had been given in *Gebser* – that the teacher was making inappropriate comments in class – "was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." 524 U.S. at 291. What *Gebser* did not make clear was whether the actual notice requirement could indeed be satisfied by notice

of misconduct which was "[ ]sufficient to alert" school authorities to "the possibility" that a teacher might engage in more serious abuse.

Six circuits have already addressed this issue. The grave injuries at issue weigh heavily in favor of granting review of the question presented at this time, without awaiting further developments in the lower courts. A majority of the cases arising under *Gebser*, like *Gebser* itself, concern adult teachers engaging in sexual contacts with minor children. Too many Title IX actions, as in the instant case, involve child molestation.[29] Such abuses can cause long lasting and devastating psychological harm to the victims. The decisions in the Eleventh and Fourth Circuits permit officials in federally assisted primary and secondary schools to deliberately ignore these abuses, so long as the repeated warnings and complaints concern misconduct short of child molestation, or where, as in *Baynard*, the child molester is simply between victims. Certiorari should be granted to

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[29] *E.g.*, *Warren v. Reading School Dist.*, 278 F.3d 163, 165 n.1 (3d Cir. 2002) (teacher prosecuted for three counts of sexual abuse of fourth grade male students); *Shrum v. Kluck*, 249 F.3d 773, 776 (8th Cir. 2001) (teacher pled guilty to crime of Indecency with a Child); *R.M.R. v. Muscogee County School Dist.*, 165 F.3d 812, 814 (11th Cir. 1999) (teacher arrested for child molestation); *Davis v. DeKalb County School Dist.*, 233 F.3d 1367, 1369 (11th Cir. 2000) (teacher convicted of six counts of child molestation); *Bell v. Harge*, 81 Fed. Appx. 943, 944 (9th Cir. 2003) (teacher arrested for sexual contact with student); *Williams v. Paint Valley Local School Dist.*, 400 F.3d 360, 362 (6th Cir. 2005) (teacher assertedly molested six fourth-grade boys).

make clear that schools subject to the requirements of Title IX can be held liable if their officials act in such a willfully irresponsible manner.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-11565

D. C. Docket No. 04-00151 CV-WCO-2

KEVIN DALE, individually and as the next friend and natural Parent and Natural Guardian of M.D., a Minor; and BRYAN J. CARLYLE and LISA J. CARLYLE, Individually and as the Next Friend and Natural Parent and Natural Guardian of A.C., a Minor,

Plaintiffs-Appellees,

versus

WHITE COUNTY, GEORGIA SCHOOL DISTRICT, WHITE COUNTY, GEORGIA BOARD OF EDUCATION, DONNA ALLEGOOD, ROGER FITZPATRICK,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(June 27, 2007)

Before BLACK and PRYOR, Circuit Judges, and LIMBAUGH,* District Judge.

PER CURIAM:

I. BACKGROUND

Kevin and Abby Dale and Bryan and Lisa Carlyle, individually and on behalf of their minor daughters, (Plaintiffs) sued White County School District, White County Board of Education, Donna Allegood, and Roger Fitzpatrick (Defendants) for various claims including violations of 42 U.S.C. § 1983 and 20 U.S.C. § 1681 (Title IX). The suit arises from Plaintiffs' allegations that White County School District teacher Jocy Wilson molested their daughters while the girls were students in his class. At the time the conduct occurred, Allegood was the Principal of the school and Fitzpatrick was the Assistant Principal.

The district court granted Defendants summary judgment on several claims and denied them summary judgment on others. Allegood and Fitzpatrick now appeal the district court's denial of summary judgment on the § 1983 claims and White County School District and White County School Board

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* Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation.

appeal the denial of summary judgment on the Title IX claim.[1]

II. DISCUSSION

We review the district court's denial of summary judgment *de novo,* applying the same legal standard as the district court. *Mize v. Jefferson City Bd. of Educ.,* 93 F.3d 739, 742 (11th Cir. 1996). A motion for summary judgment is granted if, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the nonmoving party has failed to make a sufficient showing of an essential element in its case. *Id.*

Plaintiffs allege their daughters were molested by their fifth-grade teacher, Wilson, while they were students at a White County school. They assert the Principal and Assistant Principal are liable for violations of the students' constitutional rights to bodily integrity under supervisory liability, and the school

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[1] In a May 23, 2006 order, a panel of this Court determined this Court has jurisdiction over the interlocutory appeals of Allegood and Fitzpatrick based on their defense of qualified immunity. It also found this Court has pendent appellate jurisdiction over the interlocutory appeal of White County School District. On July 27, 2006, this Court denied White County School District permission to immediately appeal the district court's denial of its motion for summary judgment on Plaintiff's § 1983 claim based on the school district's alleged failure to train officials. In this interlocutory appeal we do not have jurisdiction over the § 1983 claim against White County School District, and therefore it remains in the district court.

district is liable for violations of Title IX. They contend Allegood and Fitzpatrick responded with deliberate indifference to incidents that should have put them on notice of Wilson's improper conduct. Plaintiffs claim White County School District is liable under Title IX for the deliberate indifference of an official who had the authority to correct the harassment.

A. § 1983 claims against Allegood and Fitzpatrick

Plaintiffs assert liability under § 1983 based on allegations Allegood and Fitzpatrick had notice Wilson was a danger to students and responded with deliberate indifference. Allegood and Fitzpatrick assert (1) qualified immunity protects them from liability, (2) they did not have notice Wilson would sexually molest a child, and (3) their response to any incidents regarding Wilson did not amount to deliberate indifference.

Qualified immunity protects government officials performing discretionary functions from civil liability. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). Whether an official is entitled to qualified immunity is a two-step inquiry: (1) whether the facts alleged show the officer's conduct violated a constitutional right, and (2) whether that right was clearly established. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).

Viewing the evidence in the light most favorable to the Plaintiffs, we assume Wilson violated the

constitutional rights of Plaintiffs' daughters. Allegood and Fitzpatrick did not personally molest the students; therefore the issue in this case is whether the school district and its officials are liable for Wilson's conduct under supervisory liability.

Supervisory officials may not be held liable under § 1983 for the acts of their subordinates under a theory of respondeat superior or vicarious liability. *Hartley v. Parnell,* 193 F.3d 1263, 1269 (11th Cir. 1999). However, even if a supervisor did not personally perpetrate the violation, supervisors may be held liable under § 1983 for constitutional violations of their subordinates when a supervisor "personally participates" in the constitutional violation or when there is a "causal connection" between the supervising official's acts and the constitutional deprivation alleged. *Id.* at 1269. A party can establish a causal connection in several ways. First, a party can show a supervisor should have been on notice of the need to correct unconstitutional conduct by "a history of widespread abuse" that is "obvious, flagrant, rampant and of continued duration." *Brown v. Crawford,* 906 F.2d 667, 671 (11th Cir. 1990). "A causal connection can also be established by facts which support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." *Dalrymple v. Reno,* 334 F.3d 991, 996 (11th Cir. 2003). In addition, a plaintiff can show a supervisor imposed an improper custom or policy

that constituted deliberate indifference to constitutional rights. *Hartley*, 193 F.3d at 1269.

Plaintiffs do not allege Allegood or Fitzpatrick personally participated in the violation and have failed to show a causal connection supporting supervisory liability. The facts alleged do not show either defendant (1) had notice Wilson was a threat to students through a history of obvious, flagrant, and widespread abuse of students by Wilson, (2) knew Wilson would abuse students and failed to stop him, or (3) instituted an improper custom or policy that resulted in deliberate indifference to students' constitutional rights. We conclude Allegood and Fitzpatrick are not liable for the alleged constitutional violations under a theory of supervisory liability.

Since we find there was no constitutional violation on the part of these defendants under the first prong of the qualified immunity analysis, we do not reach the question of whether the violation was clearly established. Allegood and Fitzpatrick are entitled to qualified immunity under these circumstances.

B. Title IX Claims against White County School District

Plaintiffs assert White County School District is liable for violating their daughters' rights under Title IX for discrimination on the basis of sex. School districts may be liable under Title IX for a teacher's sexual harassment of a student when "an official of

the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277, 118 S. Ct. 1989, 1993 (1998). "A school district must have actual notice before it can be held liable in damages for intentional discrimination based on sex."*Davis v. DeKalb County Sch. Dist.*, 233 F.3d 1367, 1372 (11th Cir. 2000). Deliberate indifference "is an official decision . . . not to remedy the violation" or a refusal to take action to comply with Title IX. *Gebser*, 524 U.S. at 290, 118 S. Ct. at 1999. "[T]he relevant inquiry is not whether the measures taken were effective in stopping discrimination, but whether the school district's actions amounted to deliberate indifference."*Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279, 1285 (11th Cir. 2005).

Plaintiffs allege Allegood was a supervisory official with authority to take corrective action on behalf of the school district. Assuming she was such an official, we previously determined that the evidence does not support the claim that Allegood had actual notice that Wilson was molesting students. Therefore, White County School District is not liable under Title IX for any discrimination Wilson may have committed.

III. CONCLUSION

We conclude that Allegood and Fitzpatrick are not liable on Plaintiffs' § 1983 claims because they are entitled to qualified immunity, and White County School District is not liable on Plaintiffs' Title IX claims. Therefore, we reverse the district court's denial of Allegood and Fitzpatrick's motion for summary judgment on the § 1983 claims and the denial of White County School District's motion for summary judgment on the Title IX claims. We remand to the district court for entry of judgment consistent with this opinion for Allegood, Fitzpatrick, White County School District, and White County Board of Education.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

KEVIN DALE and ABBY DALE, Individually and as the Next Friends and Natural Parents and Natural Guardians of M.D., a Minor; and BRYAN J. CARLYLE and LISA J. CARLYLE, Individually and as the Next Friends and Natural Parents and Natural Guardians of A.C., a Minor, Plaintiffs, v. STEPHENS COUNTY (GEORGIA) SCHOOL DISTRICT; STEPHENS COUNTY (GEORGIA) BOARD OF EDUCATION; PATRICIA BAILEY, Individually and in her Official Capacity as Former Superintendent for the STEPHENS COUNTY SCHOOL DISTRICT; BETH RUTHERFORD, Individually and in her Official Capacity as Current or Former Human Resources Director for the STEPHENS COUNTY SCHOOL DISTRICT; STAN McFARLIN, Individually and in his Official Capacity as Current	CIVIL ACTION NO. 2:04-CV-151-WCO

or Former Principal of LIBERTY ELEMENTARY SCHOOL with the STEPHENS COUNTY SCHOOL DISTRICT; WHITE COUNTY (GEORGIA) SCHOOL DISTRICT; WHITE COUNTY (GEORGIA) BOARD OF EDUCATION; DONNA ALLEGOOD, Individually and in her Official Capacity as Current or Former Principal of MOUNT YONAH ELEMENTARY SCHOOL with the WHITE COUNTY SCHOOL DISTRICT; and ROGER FITZPATRICK, Individually and in his Official Capacity as Current or Former Assistant Principal of MOUNT YONAH ELEMENTARY SCHOOL with the WHITE COUNTY SCHOOL DISTRICT,

Defendants.

ORDER

(Filed Feb. 28, 2006)

The captioned case is before the court for consideration of defendants' motions for summary judgment [109-1, 110-1], plaintiffs' motions to strike [130-1, 134-1], plaintiffs' motions to quash subpoenas [83-1, 88-1], and non-party, the Family Relations Program, Inc.'s, motion to quash subpoenas [85-1].

I. Factual Background and Procedural History[1]

In 1998, Joey Wilson was hired by Stephens County School District ("SCSD") to teach third grade at Liberty Elementary School. Wilson also taught fifth grade at the school. In March 2001, Brenda Duffus, a school paraprofessional whose daughter was a student in Wilson's class, approached Stan McFarlin, the school's principal, with concerns about Wilson's inappropriate sexual conduct toward his female students. Wilson joined the meeting and explained that his behavior was not sexual in nature. McFarlin then instructed him to avoid physical contact with his female students. A few days later, however, Duffus returned with Connie Worley, the school media specialist, and reiterated her concerns about Wilson's behavior.[2]

Worley then took her complaints to the SCSD superintendent, Patricia Bailey, formerly Patricia McCollum. Bailey instructed Beth Rutherford, the human resources director for SCSD, to investigate Wilson's conduct. Rutherford interviewed several

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[1] The recited facts are taken from the parties' statements of material facts and supporting documentation except where otherwise noted.

[2] McFarlin claims that Duffus's original complaint was the first he received about Wilson. Plaintiffs, however, allege that Worley spoke with McFarlin about Wilson's conduct two or three times in January and February 2001 before returning with Duffus in March.

students, parents, and teachers, made notes, and obtained some signed statements.[3] SCSD also placed a paraprofessional in Wilson's classroom to observe him at all times during the investigation. The complaints from Duffus and Worley and the investigation revealed allegations that Wilson had lifted female students onto playground equipment, picked them up and thrown them over his shoulder, massaged their necks and shoulders while they were in class, "popped" a girl's bra, questioned students about their menstrual cycles, and made a comment to another teacher that a fifth grade girl would have "a nice set of [breasts] on her when she grows up."

Wilson was confronted with these allegations by Bailey and Rutherford after the investigation was completed. He provided an explanation for each complaint. Rutherford and Bailey determined that Wilson's behavior was not sexual in nature and that although it showed "poor judgment," it did not violate SCSD's sexual harassment policy. After presenting the results of their investigation to the Stephens County Board of Education ("SC Board") on March 30, 2001, they recommended that Wilson's employment contract not be renewed.

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[3] Plaintiffs allege that Rutherford failed to interview many of the teachers and parents who had observed Wilson's behavior or any of the students who were on the receiving end of his inappropriate comments and behavior.

The SC Board voted unanimously not to renew Wilson's contract. Instead, Wilson was offered the option of submitting his resignation, which he did on April 4, 2001. The SC Board voted to accept his resignation, and Wilson resigned at the end of the 2000-2001 school year. No one with SCSD reported Wilson's behavior to the Georgia Professional Standards Commission ("PSC"), the Georgia Department of Family and Children's Services ("DFCS"), or any law enforcement agency.

After submitting his resignation from SCSD, Wilson applied for a teaching position with the White County School District ("WCSD"). On April 21, 2001, Tammy Mize, the personnel and planning director for WCSD, contacted Rutherford for an employment reference on Wilson. Bailey had informed Rutherford to answer specific questions regarding Wilson but to avoid volunteering information. Rutherford did not inform Mize about the allegations of Wilson's inappropriate behavior, the investigation of his conduct, or the non-renewal decision regarding his contract. Instead, Rutherford stated that Wilson was a "good teacher" who had "caused some parent complaints" perhaps because of his "sometimes abrasive personality" and who had "some problems getting along with some of the [other] teachers." When asked by Mize if she would recommend Wilson for employment, Rutherford responded that she would but "with reservations."

Seeking a further reference on Wilson, Mize contacted McFarlin, who informed her that Wilson

was "an excellent teacher" and that he would recommend him. Although McFarlin indicated that Wilson had "issues" at the school involving the staff, he too failed to inform Mize about the allegations, the investigation, or the non-renewal decision. Ultimately, Wilson was offered a teaching position as a third grade teacher at White County Elementary School.

During the 2001-2002 school year, Wilson's first year at White County Elementary School, Deborah Anderson, a first year teacher, complained to Donna Allegood, the school's principal, that Wilson made her feel uncomfortable and that he had touched her arm when they were alone. Allegood told Anderson that she should talk to Wilson herself. Anderson also reported to Allegood that Wilson had embarrassed a student by having the other students tell her why they did not want to be her friend. Plaintiffs also allege that Anderson made other complaints at this time to Allegood regarding Wilson's inappropriate behavior toward students, but Allegood denies this.

Also during the 2001-2002 school year, a parent informed Allegood that Wilson would talk only to the mothers of his students, not to the fathers. Allegood was also informed that, after a female student had complained about Wilson touching her hair and hugging her, Wilson informed the entire class that he could no longer push the children on the swings or give them hugs because of this particular student. Plaintiffs allege that several other complaints about Wilson's behavior were made to Allegood and to assistant principal Roger Fitzpatrick during the

2001-2002 school year, but Allegood and Fitzpatrick deny receiving these complaints.[4]

In the 2002-2003 school year, Wilson taught fifth grade. On December 2, 2002, H.C., a female student, and her parents reported to Allegood that Wilson had touched the top of her leg or thigh while he was working with her at the computer. The parents also reported the incident to DFCS, which conducted an investigation. DFCS informed Allegood that the case was closed on January 2, 2003 and that there were no substantial findings. No one from WCSD made any independent investigation of the incident, nor did anyone report it to the PSC. H.C. was removed from Wilson's class, and Allegood counseled Wilson not to touch students on any part of the body where such contact could be perceived as sexual in nature.

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[4] Specifically, plaintiffs allege that Anderson told Allegood that she saw Wilson stroking his female students' hair and observed him sitting on the floor with students lying on his outstretched legs. There is uncertainty as to when Anderson made the latter complaint, and Allegood denies ever receiving the former. Plaintiffs also assert that a parent complained to both Allegood and Fitzpatrick that Wilson massaged the feet and shoulders of his female students and had them massage his feet and shoulders. Allegood and Fitzpatrick deny that the parent complained of this type of behavior. Allegood also denies plaintiffs' allegations that she was informed by a nurse that the "Good Touch/Bad Touch" teacher was concerned with the way Wilson leaned over a student. Furthermore, although plaintiffs allege that Allegood personally observed Wilson allowing his students to rest their heads on his legs, Allegood denies this.

Plaintiffs M.D. and A.C. were both students in Wilson's fifth grade class during the 2002-2003 school year at the new Mount Yonah Elementary School. On September 29, 2003, after being confronted by her parents regarding a cryptic note, A.C. told them that Wilson had been touching her breasts and bottom since the second week of school. That same day, A.C. and her parents, Bryan and Lisa Carlyle, met with Allegood, who promised to speak with Wilson about the allegations. Allegood and Fitzpatrick confronted Wilson, but he denied that the touching was inappropriate and characterized it as inadvertent.

The Carlyles returned that afternoon for a second meeting with Allegood, Fitzpatrick, and Melodie Palmer, the school counselor. The parties are in dispute as to whether A.C. described Wilson as touching her breasts or her stomach. Allegood told A.C. that she must be mistaken about Wilson. When asked whether she wanted to remain in Wilson's class, A.C. said that she did. Although her parents did not want her to return to Wilson's class, the plan was for A.C. to return to his class the following day. Allegood did not report the allegations made by A.C. to anyone on September 29, 2003.

That evening, A.C. told her friend and classmate, M.D., about the meetings with Allegood. M.D. then told her mother that Wilson had been touching her on her breasts and her bottom and that he had made a comment that her shirt showed off her curves. M.D.'s parents, Kevin and Abby Dale, contacted the sheriff's department and called the Carlyles to come to their

home to meet with a deputy. After listening to the allegations and asking a few questions, the deputy wrote an incident report, concluding that the children had been molested.

The next morning, September 30, 2003, the Dales met with Allegood to inform her of M.D.'s allegations regarding Wilson and of their call to the sheriff's department. Allegood then reported the allegations of both girls to Dr. Shaw, the superintendent for WCSD. Shaw and Allegood met with Wilson to inform him of the allegations and that an investigation would be conducted. Shaw instructed Wilson not to touch any students or confront them about the allegations. Shaw also called the sheriff's department at this time. The Dales and Lisa Carlyle met with Shaw and were told that Wilson would remain in the classroom until the investigation was completed. Beginning on October 1, 2003, a paraprofessional was assigned to observe Wilson's classroom on a full-time basis.

On October 1, 2003, A.C. and M.D. were interviewed by the sheriff's department. When they returned to school, Allegood transferred them to another teacher's class. On October 2, 2003, other parents contacted Allegood regarding complaints from their daughters of sexually inappropriate touching by Wilson. Shaw then told Wilson not to return to the school on October 3, 2003 and to stay away until further notice.

On October 2, 2003, Wilson was indicted for one count of child molestation, namely rubbing the inner

thigh of H.C. On October 6, 2003, Wilson was indicted for nine additional counts of child molestation, including acts against A.C. and M.D. as well as acts against two other minors. On October 31, 2003, Shaw initiated the process of terminating Wilson's contract and formally suspended him from his teaching duties pending a termination hearing. In lieu of the hearing, Wilson tendered his resignation.

Plaintiffs brought Title IX claims against both WCSD and SCSD. Plaintiffs also sued WCSD, SCSD, Allegood, Fitzpatrick, Rutherford, McFarlin, and Bailey for violations of plaintiffs' liberty interests under both 42 U.S.C. § 1983 and the Georgia Constitution. Plaintiffs also brought claims against all defendants under 42 U.S.C. §§ 1985 and 1986. In addition, plaintiffs asserted state law claims of negligence and negligence per se against all of the individual defendants for failure to perform their ministerial duties. Plaintiffs also brought parental claims and claims for punitive damages against all defendants. In an order dated December 10, 2004, the court dismissed the Title IX claim against SCSD and the state law claims of negligence and negligence per se against McFarlin. The defendants move for summary judgment on all claims. Plaintiffs responded and moved to strike certain portions of defendants' motions.

Both the Stephens and the White County defendants have served discovery requests on plaintiffs for medical records, including psychiatric records. Plaintiffs object to production of these records based on

psychotherapist privilege. On July 15, 2005, defendants served the Family Relations Program, Inc. ("FRP"), a non-profit organization that has provided counseling services to plaintiffs and a non-party to the litigation, with subpoenas requiring the production of plaintiffs' records on July 20, 2005. The Dale and Carlyle plaintiffs have each filed motions to quash the subpoenas. FRP has also filed a motion to quash the subpoenas. Defendants have filed responses to these motions to quash. During a conference in chambers on August 26, 2005, the court decided to reserve its ruling on these motions to quash until it had considered defendants' motions for summary judgment.

II. Plaintiffs' Motions to Strike

In response to defendants' motions for summary judgment, plaintiffs moved to strike all portions of defendants' motions that address issues other than those which plaintiffs allege defendants informed them would be the basis of their summary judgment motions. Plaintiffs claim that, during the August 26, 2005 conference, the court granted defendants' request to bifurcate discovery after defendants stated that their summary judgment motions would address only limited areas. The court, however, did not bifurcate discovery. To the extent that defendants indicated their intention to limit their motions to issues of liability, plaintiffs reasonably could have expected that defendants meant to address all areas of liability.

Furthermore, plaintiffs' motions to strike are procedurally defective. A motion to strike is applicable only to matters contained in pleadings. Fed. R. Civ. P. 12(f); *see also McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290, 1298 (M.D. Ga. 2003). Motions for summary judgment are not pleadings. *See* Fed. R. Civ. P. 7(a). Accordingly, plaintiffs' motions to strike are **DENIED.**

III. Defendants' Motions for Summary Judgment

A. Summary Judgment Standard

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only those claims for which there is no need for a factual determination and for which there is a clear legal basis are properly disposed of through summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

It is well-settled that a court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. *See, e.g., Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). It is important to recognize, however, that this principle does not require the parties to concur on every factual point. Rule 56 "[b]y its very terms . . . provides that the mere existence of *some* alleged

factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Consideration of a summary judgment motion does not lessen the burden on the nonmoving party. The nonmoving party still bears the burden of coming forth with sufficient evidence. *See Earley v. Champion Intl Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). However, it is important to note the difference "between direct evidence and inferences that may permissibly be drawn from that evidence. Where a nonmovant presents direct evidence that creates a genuine issue of material fact, the only issue is one of credibility; thus, there is no legal issue for the court to decide." *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996). On the other hand, "[a] court need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the nonmovant relies, are 'implausible.'" *Id.* at 743. Adopting language from one of its sister circuits, the Eleventh Circuit stated:

> If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. The nonmoving party's evidence must be taken as true. Inferences from the nonmoving party's "specific facts" as to other material facts, however,

> may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law. This inquiry ensures that a "genuine" issue of material fact exists for the factfinder to resolve at trial.

Id. (citation omitted). "Where the evidence is circumstantial, a court may grant summary judgment when it concludes that no reasonable jury may infer from the assumed facts the conclusion upon which the nonmovant's claim rests." *Id.*

B. Title IX Claim

Count I of plaintiffs' complaint is brought against WCSD pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"). Title IX provides, in relevant part, that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Plaintiffs allege that they were subjected to discrimination and harassment because of their sex by Wilson and that WCSD is liable under Title IX for failing to prevent such harassment.

Sexual abuse and sexual harassment by a teacher constitute discrimination under Title IX. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60,

75 (1992). To impose liability against the school district for a Title IX violation, however, the plaintiff must establish that an "appropriate person" had actual notice of the teacher's misconduct and was deliberately indifferent to it. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). Defendant WCSD contends that summary judgment is appropriate on the Title IX claim because (1) Allegood was not an "appropriate person" under *Gebser*; (2) no school official had actual knowledge of Wilson's misconduct; and (3) school officials did not act with deliberate indifference.

Although the Supreme Court failed to delineate who is an "appropriate person" within the Title IX framework, it did note that the "appropriate person" must be an official of the school district with authority to address the discrimination and institute corrective measures. *Gebser*, 524 U.S. at 290. The United States Court of Appeals for the Eleventh Circuit has likewise failed to resolve who constitutes an "appropriate person" under *Gebser*. *Davis v. DeKalb County Bch. Dist.*, 233 F.3d 1367, 1372 n. 5 (11th Cir. 2000). Given that the WC Board's Title IX policy designated the school principal as the official responsible for Title IX compliance efforts with regard to students, a reasonable factfinder could determine that, as principal, Allegood had the authority to address the discrimination and institute corrective measures.

Plaintiffs do not contend that WCSD had actual notice of the sexual touching endured by M.D. and A.C. while it was occurring. Instead, plaintiffs argue

that the school district should have known that Wilson was abusing the students based on prior complaints regarding his inappropriate conduct toward other students. Plaintiffs cite to several incidents of Wilson's misconduct that were allegedly reported to Allegood prior to the 2003-2004 school year, including having female students massage his feet and shoulders, leaning over students in a manner that concerned another teacher, touching and hugging students, running his fingers through female students' hair, allowing female students to lie with their heads resting against his legs, and rubbing H.C.'s thigh.[5]

In *Davis,* the Eleventh Circuit addressed the issue of actual notice under Title IX. The plaintiffs in *Davis* alleged that the school district either knew or should have known that the teacher in question was sexually abusing them based on a prior complaint from a student who was not a party to the case that the teacher touched her behind while she was hiking a football to him during a football game and later tried to touch her at the water fountain before she moved away. 233 F.3d at 1372-73. The court found that a complaint of "an incidental touching during an athletic event" and a "perceived imminent touching"

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[5] Although the parties are in dispute as to when Allegood became aware of some of these incidents, viewed in the light most favorable to plaintiffs, she knew about them prior to the 2003-2004 school year when plaintiffs were allegedly abused.

was insufficient to constitute actual notice of sexual harassment. *Id.* at 1373.

The Eleventh Circuit also found that the plaintiffs in *Davis* could not establish the deliberate indifference element of their Title IX claim as the school principal instituted corrective measures against the teacher. *Id.* at 1373-75. The principal ordered an investigation, during which the alleged victim, other students, and the teacher were all interviewed. *Id.* at 1373. The school officials determined that the touching was inadvertent. *Id.* The principal also removed the complaining student from one of the teacher's classes, offered to remove her from the other class, and followed up with her to determine whether she had any further complaints. *Id.* In addition, the principal directed the teacher to avoid all out-of-class contact with the student and monitored the teacher for further indiscretions. *Id.* at 1374. The court concluded that the school district "responded with anything but deliberate indifference." *Id.* at 1373.

The Eleventh Circuit also addressed deliberate indifference in *Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279 (11th Cir. 2005). This case involved a sexual relationship between a teacher and a high school student that was ultimately discovered through an explicit note written by the student. Over a period of three years, school officials received a complaint concerning the teacher's relationship with another student, an anonymous e-mail alleging that the teacher had engaged in inappropriate relationships with certain former students, and an anonymous

call from a person who had observed the vehicles of the teacher and the plaintiff parked in the woods. *Id.* at 1281-82. After each complaint, school officials began an investigation, interviewing both the student involved and the teacher, removed the student from the teacher's class, and warned the teacher to refrain from any appearance of impropriety in dealing with students. *Id.* at 1286-87. During the investigations, school officials consulted each other, shared notes from previous investigations, and continued to monitor the teacher for suspicious behavior. *Id.* After the third complaint, the assistant superintendent contacted the PSC to request that it investigate the teacher. *Id.* In light of these corrective measures taken by school officials, the Eleventh Circuit determined that the school did not respond with deliberate indifference to any of the complaints. *Id.*

The prior complaints against Wilson are more severe and more numerous than the complaint lodged against the teacher in *Davis*. If each incident were considered separately as it was reported, these incidents may not have risen to the level of actual notice under *Gebser*. However, the cumulative effect of these complaints should have placed Allegood on notice that Wilson was engaging in sexually inappropriate conduct with his students.

Furthermore, Allegood's response to the prior complaints was less diligent than that of the school officials in *Davis* and *Sauls*. Although Allegood removed H.C. from Wilson's class after her complaint and warned Wilson not to touch students inappropriately,

there is no evidence of further investigation by any WCSD official. WCSD cites to the results of the DFCS investigation as evidence of a sufficient response. The school district, however, made no independent investigation to determine whether Wilson was touching other students. The district also failed to follow up with H.C. or to continue to monitor Wilson for further indiscretions. Also, there is no evidence of any investigation or corrective measures taken regarding any of the earlier complaints. In light of the increasingly serious nature of these complaints, WCSD's failure to sufficiently respond constitutes deliberate indifference.

Viewing the evidence in the light most favorable to plaintiffs, the court finds that they have established that Allegood, a supervisor with authority to take corrective action, was placed on notice of Wilson's bad conduct and failed to adequately respond. Accordingly, defendant WCSD's motion for summary judgment is DENIED as to Count I.

C. 4 U.S.C. § 1983 Claims

Counts III and IV of plaintiffs' complaint are brought against the WCSD and SCSD defendants pursuant to 42 U.S.C. § 1983. Plaintiffs claim that Wilson, acting under color of state law, violated their constitutional rights and that defendants acted with deliberate indifference to their complaints in failing to take action to prevent Wilson's conduct.

The Eleventh Circuit has recognized that students have a liberty interest in freedom from unwanted exposure of their bodies in school. *See Thomas v. Roberts,* 261 F.3d 1160, 1168 (11th Cir. 2001), *citing Justice v. City of Peachtree City,* 961 F.2d 188, 191 (11th Cir. 1992) (although students surrender some expectations of privacy when they enter a school, they retain an expectation and privacy interest that they will be free from unconstitutional strip searches). The Fifth Circuit has also ruled that students have a liberty interest in their "bodily integrity" and that a school employee's physical sexual abuse violates that right. *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443 (5th Cir.), *cert. denied, Lankford v. Doe,* 513 U.S. 815 (1994); *see also Hackett v. Fulton County Sch. Dist.,* 238 F. Supp. 2d 1330, 1354 (N.D. Ga. 2002) (Carnes, J.), *citing Doe v. Taylor.* Doe further established that a public school teacher acts under color of state law when there is a sufficient nexus between the teacher's duties and his sexual misconduct toward a student. *Doe,* 15 F.3d at 452 n.4. None of the defendants dispute plaintiffs' contention that Wilson's conduct deprived them of their right to bodily integrity under the Fourteenth Amendment or that Wilson did so under color of state law. Thus, the court assumes that plaintiffs have established a violation of their constitutional right at the hands of a state actor. The court, however, must address whether defendants, none of whom was the immediate perpetrator, may be liable for the deprivation of plaintiffs' rights.

1. Liability of Allegood and Fitzpatrick

Plaintiffs have alleged that defendants Allegood and Fitzpatrick are liable in both their individual and official capacities under § 1983 because they acted with deliberate indifference in failing to prevent the violation of plaintiffs' rights. Allegood and Fitzpatrick claim that they are entitled to qualified immunity because (1) they cannot be liable for Wilson's actions and (2) they did not violate any clearly established right of plaintiffs.

Qualified immunity shields government officials performing discretionary acts from § 1983 liability if their acts do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Jackson v. Sauls,* 206 F.3d 1156, 1164 (11th Cir. 2000) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). To invoke qualified immunity, an official must first prove that the allegedly unconstitutional actions occurred while he or she was acting within the scope of his or her discretionary authority. *See, e.g., Harbert Intl, Inc. v. James,* 157 F.3d 1271, 1282 (11th Cir. 1998); *Evans v. Hightower,* 117 F.3d 1318, 1320 (11th Cir. 1997); *Hudgens v. City of Ashburn,* 890 F.2d 396, 404 (11th Cir. 1989); *Rich v. Dollar,* 841 F.2d 1558, 1563-64 (11th Cir. 1988). To meet this burden, the defendant must show that the challenged actions were undertaken pursuant to the performance of his or her duties and within the scope of his or her authority. *Lenz v. Winburn,* 51 F.3d 1540, 1545 (11th Cir. 1995).

Plaintiffs argue that defendants cannot assert a qualified immunity defense because Allegood and Fitzpatrick's duty to report the complaints against Wilson was ministerial rather than discretionary. A discretionary act is generally characterized as one requiring personal judgment and deliberation and involving an examination of facts. *Miree v. United States,* 490 F. Supp. 768, 774 (N.D. Ga. 1980). A ministerial act, on the other hand, is one that is "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." *Id.* Although the Georgia PSC Code of Ethics for Educators ("Code") required educators to report breaches of standards, including child abuse, child endangerment, and sexual harassment, the Code did not make clear whether educators were required to report all allegations of such breaches.[6] Ga. Prof. Standards Comm'n R. 505-6-.01(4)(a). As the complaints made to Allegood and Fitzpatrick did not contain proof that the alleged unethical conduct occurred, their duty to report these complaints was a discretionary duty requiring investigation and judgment. The court will therefore examine whether Allegood and Fitzpatrick are entitled to qualified immunity.

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[6] The Code requires an educator to "report a breach of one or more of the Standards in the Code of Ethics for Professional Educators as soon as possible but no later than ninety (90) days from the date the educator became aware of an alleged breach." Ga. Prof. Standards Comm'n R. 505-6-.01(4)(a). Thus, the Code does not clearly require an educator to make the report until the educator had some proof of the breach rather than mere allegations.

The first part of the qualified immunity analysis requires the court to determine whether the facts alleged show that the official's conduct violated the plaintiff's constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Plaintiffs' theory of recovery against Allegood and Fitzpatrick rests on supervisory liability. Supervisory liability under § 1983 can be established by a showing that there is a causal connection between the supervisor's actions and the constitutional deprivation. *Braddy v. Fla. Dept. of Labor & Employment Sec.,* 133 F.3d 797, 801 (11th Cir. 1998). A plaintiff may establish such a causal connection by showing a history of widespread abuse sufficient to put the supervisor on notice of the need to correct the deprivation and the supervisor's failure to do so. *Id.* As discussed above, the evidence presented by plaintiffs indicates that Allegood was on notice that Wilson was sexually abusing his students and that her inadequate response constituted deliberate indifference to plaintiffs' rights. Plaintiffs have presented similar evidence showing that Fitzpatrick was also on notice of Wilson's misconduct and that he likewise acted with deliberate indifference. Thus, the court finds that these escalating complaints alleged by plaintiffs constitute widespread abuse sufficient to notify Allegood and Fitzpatrick of the need to stop Wilson's misconduct and that Allegood and Fitzpatrick failed to do so. Thus, it is a genuine issue of material fact as to whether defendants' failure to act deprived plaintiffs' of their constitutional right to bodily integrity.

The second part of the qualified immunity analysis requires a determination that the constitutional or statutory right that was violated was clearly established. Such rights are "clearly established" for qualified immunity purposes if the controlling case law has "earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that [the conduct at issue] violates federal law." *Lassiter v. Ala. A&M Univ. Bd. of Trs.*, 28 F.3d 1146, 1149 (11th Cir. 1994). Controlling case law recognizes a student's liberty interest in bodily integrity. *See Thomas,* 261 F.3d at 1168. Furthermore, the law also establishes that supervisory liability can be imposed upon a school official with sufficient notice of a teacher's prior inappropriate acts whose response constitutes deliberate indifference. *See Hartley v. Parnell,* 193 F.3d 1263 (11th Cir. 1999) (court found no supervisory liability for superintendent where there had been no prior accusations of improper behavior by teacher); *see also, Davis,* 233 F.3d at 1373-1376 (court found no liability under § 1983 for principal where prior complaints were not sufficient to give notice of sexual harassment and principal's actions did not constitute deliberate indifference).

As noted above, plaintiffs have presented evidence that Allegood and Fitzpatrick's response to prior complaints about Wilson's misconduct fell far below the level that would have been considered an appropriate response. Plaintiffs have created a genuine issue of material fact that Allegood and

Fitzpatrick had actual notice that Wilson was engaging in sexually inappropriate acts with his students. Plaintiffs have also created a genuine issue of material fact that the officials' failure to fully investigate the claims or to monitor Wilson constituted deliberate indifference. Thus, under *Davis,* defendants had fair warning that school officials who act with deliberate indifference to a teacher's violation of students' constitutional rights can be liable under § 1983. The court concludes that the clearly established law gave Allegood and Fitzpatrick notice that their failure to properly investigate a claim of sexual molestation of a student by a teacher and failure to further monitor the teacher was unconstitutional. Accordingly, defendants Allegood and Fitzpatrick's motion for summary judgment is DENIED as to Count III.

2. Liability of WCSD

Plaintiffs also seek to hold WCSD liable for the deprivation of their constitutional rights. Under § 1983, a government entity cannot be held liable on a theory of *respondeat superior. Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978). Instead, to maintain an action under § 1983 against a governmental entity for an injury inflicted by its employees or agents, a plaintiff must prove that his or her alleged injury stems from an established policy or custom of the government. *Id.* In addition to identifying the municipal policy or custom that caused his injury, a plaintiff must also show that there is a direct causal link between this policy or custom and the

alleged constitutional deprivation. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). The plaintiff must demonstrate that, "through its *deliberate* conduct, the governmental entity was the 'moving force' behind the injury alleged." *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997) (quoting *Monell*, 436 U.S. at 694).

Deliberate indifference may be shown by evidence that the municipality knew of a need to train or supervise in a particular area and that the municipality made the deliberate decision not to take any action. *Harris*, 489 U.S. at 388-389. Thus, a plaintiff must show either that the municipality had actual knowledge of a need to train or supervise in a particular area or that the need to train or supervise in a particular area was so obvious that the likelihood of constitutional violations was highly predictable. *Gold v. City of Miami*, 151 F.3d 1346, 1351-52 (11th Cir. 1998). The failure to train in such an area may be considered the municipality's policy, and the municipality may be held liable if it actually caused the injury. *Harris*, 489 U.S. at 390.

Plaintiffs argue that WCSD's failure to train defendant Allegood in the area of sexual harassment and the reporting procedures of the PSC and DFCS demonstrates deliberate indifference to plaintiffs' rights. Plaintiffs have presented evidence that WCSD's policies directed students and employees of Mt. Yonah Elementary School to report claims of sexual harassment to Allegood and that she was responsible for Title IX compliance with regard to

students. Plaintiffs' evidence also shows that Allegood did not receive training in the areas of investigating and reporting complaints of sexual harassment and discrimination. Thus, plaintiffs have created a genuine issue of material fact as to whether, given Allegood's responsibility for Title IX compliance, WCSD officials should have known of the need to train her. Plaintiffs have also created a genuine issue of material fact as to whether the alleged failure to train resulted in a violation of plaintiffs' right to bodily integrity. Accordingly, defendant WCSD's motion for summary judgment is **DENIED** with regard to Count III.

3. Liability of Bailey, Rutherford, and McFarlin

Plaintiffs have alleged that defendants Bailey, Rutherford, and McFarlin are liable in both their individual and official capacities under § 1983 because they acted with deliberate indifference in failing to prevent the violation of plaintiffs' rights. The actions challenged by plaintiffs as violating their constitutional rights are failing to report the allegations of Wilson's misconduct to PSC and failing to inform WCSD of these allegations or of SCSD's decision not to renew Wilson's contract. The individual SCSD defendants claim that they are entitled to qualified immunity because they did not violate any clearly established right of plaintiffs.

As noted above, the defense of qualified immunity applies only when government officials are acting within the scope of their discretionary authority. *Haubert Int'l.*, 157 F.3d at 1281-82. Plaintiffs argue that defendants acted outside their discretionary authority when they failed to report Wilson's conduct to the PSC as required under Georgia law. Plaintiffs, however, have failed to point to any law establishing an absolute duty for educators to report allegations of sexual misconduct to the PSC.[7] Thus, defendants' decision whether to make such report was within the scope of their discretionary authority. Likewise, decisions regarding disclosure of information in job recommendations were within defendants' discretionary authority.

Plaintiffs have presented evidence that defendants' passing Wilson to WCSD without warning of

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[7] O.C.G.A. § 20-2-984.2(a) requires superintendents and directors of personnel to report written allegations of particular crimes, including child molestation, to the local board of education. Defendants have presented evidence that Wilson's misconduct was reported to the SC Board as required by this statute. Plaintiffs allege that Bailey, McFarlin, and Rutherford failed to report Wilson's misconduct to the PSC. The duty to report crimes to the PSC, however, falls to the Board itself rather than to any individual officer. O.C.G.A. § 20-2-984.2(b). Furthermore, as noted above, the Georgia PSC Code does not clearly require educators to report mere allegations of child abuse. Rather, it requires educators to report *breaches* of the Code, implying that educators are to report to PSC once they have clearly established that a breach occurred. *See* Ga. Prof. Standards Comm'n R. 505-6-.01(4)(a).

his allegedly deviant past ultimately led to their injuries. Defendants do not dispute that plaintiffs had a right to be free from sexual abuse at the hands of their teacher. Defendants do, however, argue that their conduct did not violate any clearly established law. Indeed, plaintiffs fail to cite any controlling law[8] that would establish that defendants' false recommendation of Wilson and failure to report his actions to the PSC violated their rights. In light of the pre-existing law, the unlawfulness of defendants' conduct was not apparent. *See Hope v. Pelzer,* 536 U.S. 730, 739 (2002). Although officials can still be on notice that their conduct violated established law in novel situations, the state of the law in 2001 did not give defendants fair warning that their failure to report allegations of sexual misconduct by a teacher to the PSC or to another school district where he was seeking employment was unconstitutional. *Id.* at 741.

Furthermore, the court does not find that this case fits within the "narrow exception" under which a defendant may be denied qualified immunity despite the lack of factually similar and controlling case law. *See Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir. 2000) (denying qualified immunity on basis of narrow exception in excessive force case where defendant police officer "ordered and allowed

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[8] In this court, rights are "clearly established" by decisions of the United States Supreme Court, the Eleventh Circuit, or the Georgia Supreme Court. *Hamilton v. Cannon,* 80 F.3d 1525, 1532 n.7 (11th Cir. 1996).

his dog to attack and bite Plaintiff; threatened to kill Plaintiff when Plaintiff kicked the dog in an effort to resist the unprovoked attack; and let the dog attack Plaintiff for at least two minutes"); *see also, Thomas v. Roberts,* 323 F.3d 950, 955 (11th Cir. 2003) (finding defendant teacher's strip search of students without individualized suspicion to find envelope containing twenty-six dollars unconstitutional, but granting qualified immunity due to lack of controlling case law and failure to meet narrow exception). For this narrow exception to apply, a plaintiff must show that "the official's conduct lies so obviously at the very core of what the [Constitution] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw." *Smith v. Mattox,* 127 F.3d 1416, 1419 (11th Cir. 1997) (declaring that conduct "barely" qualified for narrow exception where police officer broke the arm of an allegedly docile arrestee who had admittedly previously been fleeing). To come within this exception, the conduct must be "so far beyond the hazy border" between reasonable and unreasonable conduct that the official had to know that he or she was violating the Constitution. *Id.*

Defendants' actions, however, were not so clearly proscribed by the Fourteenth Amendment that the court can say that defendants knew that they were violating the Constitution by concealing Wilson's misconduct from WCSD when contacted for an employee recommendation. Failing to warn a future employer of a prospective teacher's previous sexual

misconduct is not at the very core of what the Fourteenth Amendment prohibits. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"). The court finds that defendants' actions, while unethical,[9] were not so egregious that defendants would have realized their unconstitutionality. Thus, these individual defendants are entitled to qualified immunity. Defendants Bailey, Rutherford, and McFarlin's motion for summary judgment is **GRANTED** as to Count IV of the complaint.

4. Liability of SCSD

Plaintiffs claim that SCSD is liable under § 1983 because the school district's policy or custom was to fail to investigate or report the sexual misconduct of teachers and that this constituted deliberate indifference to plaintiffs' substantive due process right to bodily integrity. Defendants, however, argue that

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[9] The court is appalled by the individual defendants' concealment of Wilson's misconduct. Both Georgia state law and the PSC Code place importance on reporting allegations of sexual abuse of students at the hands of teachers. *See* O.C.G.A. § 20-2-984.2; Ga. Prof. Standards Comm'n R. 505-6-.01(3)(b) & (i). Defendants should have known that their failure to disclose to WCSD the allegations of Wilson's misconduct did not conform to the spirit of the law or the ethical code. Nevertheless, the court cannot determine, based on the controlling law, that defendants' ethical failures violated clearly established law under a qualified immunity analysis.

plaintiffs cannot prove a constitutional violation under § 1983 because Stephens County defendants owed no duty to students who were outside their school system.

To hold the school district liable under § 1983 for its failure to protect them from Wilson's abuse, plaintiffs must first establish that the school officials acted pursuant to a policy or a custom of the school district and that such actions were taken with the requisite degree of culpability. *Brown,* 520 U.S. at 404. Thus, plaintiffs must show that there was a clear pattern of sexual abuse by Wilson of which the school district had notice and that its response constituted deliberate indifference. *See Davis,* 233 F.3d at 1376 ("the deliberate indifference standard applies to section 1983 claims basing liability on a municipality's actions in failing to prevent a deprivation of federal rights"). Plaintiffs must also show a direct causal link between the municipal action and the deprivation of their constitutional rights. *Brown,* 520 U.S. at 404.

Plaintiffs have presented evidence that school officials were informed as early as January 2001 of Wilson's inappropriate behavior toward his students. This evidence demonstrates that SCSD had actual notice of Wilson's misconduct. Unlike the WCSD officials, however, SCSD officials investigated these claims, reported their findings to the Board, and placed a paraprofessional in Wilson's classroom to monitor his interaction with students. Plaintiffs, however, assert that SCSD deliberately concealed Wilson's history of sexual abuse and the fact that his

contract had not been renewed, thus facilitating his contact with and continued abuse of students. Plaintiffs cite to SCSD's failure to report Wilson's conduct, its failure to provide WCSD with information that would have removed Wilson from consideration for employment, and its decision to allow Wilson to resign in lieu of terminating him as evidence of a cover-up of Wilson's misconduct. Plaintiffs claim that this cover-up amounted to a policy of deliberate indifference to plaintiffs' constitutional rights.

Here, where plaintiffs allege that the school district is liable for its inaction, plaintiffs must show that the need to act is "so obvious" that the conscious decision not to disclose Wilson's misconduct or the Board's failure to renew his contract amounts to a "custom" or "policy" of "deliberate indifference" to plaintiffs' constitutional rights. *Doe v. Claiborne County,* 103 F.3d 495, 508 (6th Gr. 1996). Plaintiffs have not presented evidence that SCSD had a widespread or pervasive custom of concealing sexual misconduct of teachers. *See Brown v. City of Fort Lauderdale,* 923 F.2d 1474, 1481 (11th Cir. 1991) ("[t]o prove § 1983 liability against a municipality based on custom, a plaintiff must establish a widespread practice that . . . is so permanent and well settled as to constitute a 'custom or usage' with the force of law"). However, under appropriate circumstances, municipal liability may be imposed for a single decision by municipal policymakers. *Pembaur v. Cincinnati,* 475 U.S. 469, 480 (1986). Viewing the evidence in the light most favorable to plaintiffs, a

reasonable fact-finder could determine that the SC Board, as the entity with policymaking authority for SCSD, made a decision to cover up Wilson's misconduct.

With regard to the culpability and causation elements of plaintiffs' claim, plaintiffs must demonstrate that the school district's alleged cover-up was made with "deliberate indifference as to its known or obvious consequences," *Brown,* 520 U.S. at 398, and that the policy was the "moving force [behind] the constitutional violation." *Monell,* 436 U.S. at 694. Thus, SCSD's cover-up must have been highly likely to inflict the particular injury suffered by plaintiffs. *Brown,* 520 U.S. at 410. The culpability standard and the causation standard are intertwined, because "the high degree of predictability may also support an inference of causation – that the [school district's] indifference led directly to the very consequence that was so predictable." *Id.*

Plaintiffs allege that WCSD would not have hired Wilson had they known about his past misconduct and that SCSD officials knew that Wilson was applying for a teaching position with WCSD where he would come into contact with students. Thus, plaintiffs argue that SCSD showed deliberate indifference to the high likelihood that Wilson would continue to molest students and that, but for the school district's cover-up of Wilson's past misconduct, he would not have been in the position to molest plaintiffs. Plaintiffs also argue that SCSD, through its policy of concealment and the recommendations issued under

this policy, caused them to be exposed to Wilson's sexual abuse.

SCSD cites to *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2000), in support of its arguments that its conduct did not rise to the level of deliberate indifference and that subsequent sexual misconduct was not so obvious as to impute § 1983 liability to it. *Shrum* involved the molestation of a student by a teacher hired in part based on a neutral letter of recommendation from the superintendent of the school district previously employing the teacher. *Id.* at 780. The letter was written as part of a confidential settlement agreement and there was no evidence that the school district knew that another school district would hire the teacher. *Id.* In the case at hand, however, plaintiffs have presented evidence that SCSD gave a positive recommendation directly to WCSD with the knowledge that it was considering Wilson for employment[10] Plaintiffs have also presented evidence that, had WCSD known of the allegations against Wilson, it would not have hired him. Thus, the court finds that plaintiffs have created a genuine issue of material fact that SCSD's alleged policy of concealing

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[10] The court finds defendant SCSD's argument that it had no duty to students outside its school district unconvincing in light of the fact that SCSD had special knowledge when it gave the recommendations that WCSD was considering employing Wilson as a teacher. Furthermore, the court notes that SCSD may have owed some duty to the public in general with regard to passing off an alleged sexual predator onto an unsuspecting school district.

Wilson's misconduct showed deliberate indifference to plaintiffs' constitutional right to bodily integrity and that the policy was the direct cause of plaintiffs' injury. Accordingly, defendants SCSD's motion for summary judgment is **DENIED** with regard Count IV.

D. 42 U.S.C. §§ 1985-1986 Claims

Counts V and VI of plaintiffs' complaint allege that defendants have conspired to deprive plaintiffs of their civil rights and neglected to prevent such a conspiracy in violation of 42 U.S.C. §§ 1985 and 1986.

> The elements of a cause of action under § 1985(3) are: (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Childree v. UAP/GA AG Chem., 92 F.3d 1140, 1146-47 (11th Cir. 1996). To establish a conspiracy claim under § 1985(3), plaintiffs must show an agreement between "two or more persons" to deprive them of their civil rights. 42 U.S.C. § 1985(3). Plaintiffs do not argue that a conspiracy existed between the two counties; rather, plaintiffs argue that defendants within each county conspired among themselves to deprive

plaintiffs of their civil rights. Plaintiffs therefore allege that each county conspired with its employees.

The intracorporate conspiracy doctrine provides that employees of a corporation, acting as agents of the corporation, cannot conspire among themselves or with the corporation. *Dickerson v. Alachua County Comm'n.*, 200 F.3d 761, 767 (11th Cir. 2000). This doctrine has been applied to public, government entities. *Id.* The case at hand involves two separate § 1985(3) claims against actors who are part of two separate single, public entities. Thus, SCSD and its employees are considered to constitute a single legal entity as are WCSD and its employees. *Id.* (county jail and its employees considered single legal entity that cannot conspire with itself); *see also, Chambliss v. Foote*, 562 F.2d 1015 (5th Cir. 1977), *aff'g* 421 F. Supp. 12, 15 (E.D. La. 1976) (intracorporate conspiracy doctrine applied to shield public university and its employees from § 1985(3) civil conspiracy claim).

Plaintiffs, however, argue that their case falls under an exception to the intracorporate conspiracy doctrine because the conspiracy alleged contains a crime. The Eleventh Circuit has recognized that the intracorporate conspiracy doctrine does not apply to alleged intracorporate criminal conspiracies. *See McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1038-39 (11th Cir. 2001). Plaintiffs allege that defendants were criminally negligent for their failure to act

to prevent the criminal acts committed by Wilson[11] that deprived plaintiffs of their civil rights. O.C.G.A. § 16-2-1 defines criminal negligence as "an act or failure to act which demonstrates willful, wanton, or reckless disregard for the safety of others who might reasonably be injured thereby."

McAndrew applied the exception to the intracorporate conspiracy doctrine to a claim under 42 U.S.C. § 1985(2) alleging a criminal conspiracy to prevent an individual from testifying in federal court by force, intimidation, or threat. 206 F.3d 1031. Plaintiffs' claim involves an allegedly criminal conspiracy under § 1985(3) where defendants allegedly conspired to interfere with plaintiffs' civil rights. This court declines to extend the criminal conspiracy exception to the intracorporate conspiracy doctrine to a § 1985(3) claim alleging a conspiracy of criminal negligence through failure to prevent a teacher from sexually inappropriate conduct which violated plaintiffs' rights. Thus, plaintiffs' claim under § 1985 is barred.

42 U.S.C. § 1986 claims are derivative of § 1985 claims. *Park v. City of Atlanta,* 120 F.3d 1157, 1159-60. Thus, § 1986 claims require a violation of § 1985. *Id.* As plaintiffs have failed to establish a violation of § 1985, plaintiffs cannot establish a claim under § 1986. Accordingly, defendants' motion for summary

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[11] Wilson was indicted for child molestation under O.C.G.A. § 16-6-4.

judgment is **GRANTED** for Counts V and VI of plaintiffs' complaint.

E. State Law Claims

In addition to alleging claims under federal law, Counts III and IV of plaintiffs' complaint allege violations of plaintiffs' liberty interests under the Georgia Constitution. There is no state law version of 42 U.S.C. § 1983 and no private right of action for the alleged violations of the Georgia Constitution. Therefore, the court will address only the state law claims of negligence and negligence per se found in Counts VII and VIII.

1. Liability of WCSD Defendants

In Count VII, plaintiffs allege that defendants Allegood and Fitzpatrick were negligent in failing to perform their ministerial duties required by O.C.G.A. § 20-2-984.2 and the PSC Code. Defendants argue that they are entitled to official immunity. The doctrine of official immunity provides that a public employee will not be personally liable for his discretionary acts unless they are willful, wanton, or outside the scope of his authority. *Gilbert v. Richardson*, 264 Ga. 744, 752 (1994), *citing* Ga. Const. of 1983, Art. I, Sec. II, Par. IX (d). The employee may be held liable for negligent ministerial acts, but immunity is provided to government officials who make policy or exercise discretion in their jobs. *Id.* at 752-53.

O.C.G.A. § 20-2-984.2 requires superintendents and directors of personnel to report written allegations of particular crimes, including child molestation, to the local board of education. Allegood and Fitzpatrick, as principal and assistant principal, are not subject to the law by the plain language of the statute. Thus, neither can be found to have negligently failed to perform his or her ministerial duties under this statute.

The PSC Code applies to all "educators." *See* Ga. Prof. Standards Comm'n R. 505-6-.01. However, as the court noted above in its discussion of qualified immunity for the § 1983 claims against Allegood and Fitzpatrick, the duty for a particular educator to report allegations of a teacher's sexual misconduct to the PSC is discretionary. *See id.* R. 505-6-.01(4)(a). As plaintiffs have failed to show evidence that either Allegood or Fitzpatrick negligently performed any ministerial act or that either acted with malice or intent to injure in performing their discretionary acts, the two defendants are entitled to official immunity. *See Gilbert*, 264 Ga. at 753. Accordingly, defendants' motion for summary judgment is **GRANTED** with regard to Count VII.

2. Liability of SCSD Defendants

Count VIII of plaintiffs' complaint alleges that defendants Bailey, Rutherford, and McFarlin were negligent in failing to perform their ministerial duties as required by O.C.G.A. § 20-2-984.2 and the PSC

Code and that they were negligent in recommending Wilson to WCSD. In an order dated December 10, 2004, the court dismissed this claim against McFarlin and determined that all three defendants were entitled to official immunity for giving the job recommendations. Bailey and Rutherford now claim that they are entitled to summary judgment on plaintiffs' state law negligence claim.

The evidence shows that Bailey and Rutherford investigated the complaints against Wilson and, at the conclusion of their investigation, reported their findings to the SC Board. This evidence demonstrates that defendants fulfilled their duty under O.C.G.A. § 20-2-984.2. Furthermore, Bailey and Rutherford are entitled to official immunity with regard to any alleged negligence in performing their discretionary duties under the PSC Code. Thus, plaintiffs have not presented any evidence that would establish that Bailey and Rutherford have failed to perform any ministerial duty. Accordingly, defendants' motion for summary judgment is **GRANTED** with regard to Count VIII of plaintiffs' complaint.

IV. Plaintiffs' Motions to Quash

In response to defendants' requests for plaintiffs' psychiatric records, plaintiffs and FRP, a non-party to the litigation, move to quash the subpoenas and assert the psychotherapist privilege. The Supreme Court established the psychotherapist-patient privilege in *Jaffee v. Redmond,* 518 U.S. 1 (1996). Courts

generally agree that a party waives the privilege by putting her mental state at issue. *See Schoffstall v. Henderson,* 223 F.3d 818, 823 (8th Cir. 2000). Courts are split, however, as to the extent to which a plaintiff's mental health must be at issue before finding a waiver of the privilege. *See Stevenson v. Stanley Bostich, Inc.,* 201 F.R.D. 551, 2001 U.S. Dist. LEXIS 16961, *15-*17 (N.D. Ga. 2001). In *Stevenson,* using a "middle ground" approach, Magistrate Judge Scofield concluded that a plaintiff does not put her mental condition at issue by asserting merely "garden variety" emotional damages. *Id.* at *18. He also concluded that the analysis to determine whether a plaintiff has put her mental condition at issue is analogous to the analysis made under Fed. R. Civ. P. 35(a) for ordering a mental examination. *Id.* at *17-*18. In *Turner v. Imperial Stores,* 161 F.R.D. 89, 95 (S.D. Cal. 1995), the court reviewed decisions analyzing Rule 35(a) motions and determined that they are typically granted when one or more of the following factors are present: (1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or physical injury or disorder; (3) a claim of unusually severe emotional distress; (4) the plaintiff's offer of expert testimony to support a claim of emotional distress; and/or (5) the plaintiff's concession that her mental condition is "in controversy" within the meaning of Rule 35.

Plaintiffs argue that, as they are seeking only "garden variety" emotional distress damages, they have not put their mental condition at issue. Plaintiffs'

claims seek damages for "mental pain and anguish and injury to their peace, happiness, and feelings, including anxiety, shock, worry, and loss of enjoyment of life" and for "emotional distress, humiliation, embarrassment." [Compl. ¶¶ 85, 88-89, 93, 95-96]. As none of the *Turner* factors are present, plaintiffs' claims are merely for "garden variety" emotional distress damages. Plaintiffs, therefore, have not put their mental condition at issue so as to have waived the psychotherapist-patient privilege. Accordingly, plaintiffs' motions to quash and FRP's motion to quash are **GRANTED**.

V. Conclusion

Based on the foregoing, WCSD defendants' motion for summary judgment [110-1] is hereby **GRANTED in part and DENIED in part**. WCSD defendants' motion is **DENIED** with regard to Counts I and III of the complaint and **GRANTED** with regard to Counts V, VI, and VII. SCSD defendants' motion for summary judgment [109-1] is hereby **GRANTED in part and DENIED in part**. SCSD defendants' motion is **DENIED** as to SCSD's liability under Count IV and **GRANTED** as to to [sic] Bailey, Fitzpatrick, and McFarlin's liability under Count IV. Also, SCSD defendants' motion is **GRANTED** with regard to Counts V, VI, and VIII. Plaintiffs' motions to strike [130-1, 134-1] are **DENIED**. Additionally, plaintiffs' motions to quash subpoenas [83-1, 88-1] and the Family Relations Program's motion to quash subpoenas [85-1] are hereby **GRANTED**.

IT IS SO ORDERED, this 28th day of February, 2006.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-11565-II

KEVIN DALE, individually
and as the next friend and
natural parent and natural
guardian of M.D., a minor child,
ABBY DALE, individually
and as the next friend
and natural parent and
natural guardian
of M.D., a minor child, et al.,

Plaintiffs-Appellees,

versus

WHITE COUNTY, GEORGIA
SCHOOL DISTRICT,
WHITE COUNTY, GEORGIA
BOARD OF EDUCATION, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

(Filed May 29, 2006)

Before CARNES and PRYOR, Circuit Judges.

BY THE COURT:

Appellees' motion to dismiss the appeal for lack of jurisdiction is DENIED. The district court's February 28, 2006, order denied appellants qualified immunity on appellees' 42 U.S.C. § 1983 claims based on legal issues and, accordingly, is immediately appealable. *Mitchell v. Forsyth,* 472 U.S. 511, 525-30, 105 S.Ct. 2806, 2815-17, 86 L.Ed.2d 411 (1985); *Cottrell v. Caldwell,* 85 F.3d 1480, 1485 (11th Cir. 1996); *McDaniel v. Woodard,* 886 F.2d 311, 313 (11th Cir. 1989). Pursuant to our authority under the doctrine of pendent appellate jurisdiction, appellant, the White County School District, may proceed on appeal of the district court's denial of its motion for summary judgment with respect to appellees' claims under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq. Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285-90, 118 S.Ct. 1989, 1997-99, 141 L.Ed.2d 277 (1998); *Swint v. Chambers County, Comm'n.* 514 U.S. 35, 51, 115 S.Ct. 1203, 1212, 131 L.Ed.2d 60 (1995); *Summit Med. Assocs., P.C. v. Pryor,* 180 F.3d 1326, 1335 (11th Cir. 1999).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-11565-II

KEVIN DALE,
individually and as the next friend and natural parent and natural guardian of M.D., a minor child,
ABBY DALE,
individually and as the next friend and natural parent and natural guardian of M.D., a minor,
BRYAN CARLYLE,
individually and as the next friend and natural parent and natural guardian of A.C., a minor child,
LISA J. CARLYLE,
individually and as the next friend and natural parent and natural guardian of A.C., a minor child,

Plaintiffs-Appellees,

versus

STEPHENS COUNTY,
GEORGIA SCHOOLD [sic] DISTRICT, et al.,

Defendants,

WHITE COUNTY, GEORGIA SCHOOL DISTRICT,
WHITE COUNTY, GEORGIA BOARD
OF EDUCATION, DONNA ALLEGOOD,
ROGER FITZPATRICK,

Defendants-Appellants.

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On Appeal from the United States District Court
for the Northern District of Georgia

- - - - - - - - - - - - - - - -

(Filed Aug. 24, 2007)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: BLACK and PRYOR, Circuit Judges, and LIMBAUGH,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

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* Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation.

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(2)

No. 07-692

FILED
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

KEVIN DALE, *et al.*,

Petitioners,

v.

WHITE COUNTY, GEORGIA SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WHITE COUNTY, GEORGIA SCHOOL DISTRICT, DONNA ALLEGOOD AND ROGER FITZPATRICK

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QUESTIONS PRESENTED

1. Whether the Court should grant the writ when Petitioners did not brief, raise or argue below the issues for which they now seek review, namely:

   a. Petitioners relied almost exclusively on Eleventh Circuit authority in arguing their claims under Title IX, 20 U.S.C. § 1681(a), and 42 U.S.C. § 1983 in the District Court and the Eleventh Circuit, including the submission of a petition for rehearing en banc;

   b. Petitioners did not at any time question the soundness or applicability of Eleventh Circuit precedent to rule on their deliberate indifference claims under Title IX and section 1983; and

   c. Petitioners did not otherwise argue that Eleventh Circuit precedent used to determine their deliberate indifference claims under Title IX and section 1983 was in conflict with the decisions of this Court or with the precedent of any other circuit.

2. Whether compelling reasons exist for the Court to grant the writ to resolve what Petitioners claim is a conflict among the circuits concerning the formulation of the deliberate indifference standard under Title IX and section 1983 when:

   a. The Eleventh Circuit correctly held that Respondents did not act with deliberate indifference based on the precedent of that circuit and the decisions of this Court;

QUESTIONS PRESENTED – Continued

b. Petitioners ask the Court to apply a formulation of the deliberate indifference standard under Title IX and section 1983 that sounds in negligence and thus is inconsistent with the decisions of this Court; and

c. The ruling of the Eleventh Circuit finding that the Respondents did not act with deliberate indifference under Title IX and section 1983 would be the same under the deliberate indifference standard as it is formulated by any circuit.

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INTRODUCTION

Respondents submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.[1] This case presents issues of entity liability under Title IX, 20 U.S.C. § 1681(a), and supervisory liability under 42 U.S.C. § 1983. The Title IX claim is against Respondent White County School District (WCSD) and the section 1983 claim is against Respondents Allegood and Fitzpatrick individually. Because of Respondent Allegood's position as principal and Fitzpatrick's position as assistant principal of the elementary school where the alleged sexual abuse occurred,[2] WCSD's liability under Title IX rests on the same facts that determine Allegood's and Fitzpatrick's personal liability under section 1983. At no point below did Petitioners argue that the "deliberate indifference" standard under Title IX and section 1983 differed in any respect pertinent to this case.

Respondents acknowledge that this Court has jurisdiction over the Petition but believe that the Court should deny the writ for two fundamental reasons. First, Petitioners have never raised in the

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[1] The Brief is timely filed. Respondents were given an extension of time to file this Brief in Opposition until January 25, 2008.

[2] This assumes that Allegood is an "appropriate person" to receive reports under Title IX, as required by this Court's decision in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

courts below the questions for which they now seek review. Second, the Eleventh Circuit correctly ruled that the District Court should have granted Respondents' motion for summary judgment. Under no extant formulation of the "deliberate indifference" standard would Petitioners' evidence authorize a jury to return a verdict against Respondents under either section 1983 or Title IX.

STATEMENT OF THE CASE

Petitioners' portrayal of the proceedings below repackages the case in two principal respects. First, their description of the evidence relating to "deliberate indifference" sanitizes the facts, mainly by omission. A more complete understanding of the *undisputed* evidence tells a different story and explains why the Eleventh Circuit reversed the District Court's denial of Respondents' summary judgment motion. Second, Petitioners ask the Court to treat this case as an "excellent vehicle" for resolving "inter-circuit" conflicts in the law under both Title IX and section 1983. Petition at 10, 29 and 39. Yet they fail to disclose important details about how counsel for Petitioners actually litigated the case below. As will be shown, these details substantially undermine Petitioners' "excellent vehicle" argument.

A. Petitioners' Evidence of Notice and Deliberate Indifference

School officials are an important line of protection against child abuse in Georgia.[3] Since 1965 when Georgia enacted a child abuse reporting statute,[4] school teachers and administrators have been subject to the reporting requirements of the statute[5] and are subject to criminal penalty for failing to report child abuse.[6] They are given immunity from civil liability for making even an erroneous report of child abuse as long as the report is made in good faith.[7] The records the WCSD has retained since 1999 show that the School District has reported 362 cases of possible child abuse. R3-110-Attach. #1-¶ 5.[8] All have involved child abuse inflicted outside the school setting. But for the intervention of school administrators and teachers, these children might not have been protected. No school official in the School District has ever been prosecuted for failure to report child abuse as required under the Georgia mandatory reporting statute. R3-110-Attach. #1-¶ 6. Since 1965, the WCSD

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[3] Unlike law enforcement and prison officials, they are not in an adversarial relationship with the children in their charge.

[4] O.C.G.A. § 19-7-5.

[5] O.C.G.A. § 19-7-5(c)(1).

[6] O.C.G.A. § 19-7-5(h) (misdemeanor violation).

[7] O.C.G.A. § 19-7-5(f).

[8] Citations to "R" are to the record on appeal in the Eleventh Circuit. Citations to "App." are to Respondents' Appendix to this Brief. And citations to "Pet. App." are to Petitioners' Appendix.

has had only two instances in which a school official has been accused of sexual misconduct involving a student. Both cases were investigated by the Professional Standards Commission (PSC)[9] and could not be substantiated. R3-110-Attach. #1-¶ 4. This history stands unchallenged by Petitioners.

White County, Georgia is a small county located in the northeast part of the state.[10] Two elementary schools serve the entire county. Respondents Allegood and Fitzpatrick are both veteran public school teachers and administrators. Allegood became principal of White County Elementary School in 2000 and opened Mount Yonah Elementary School in 2003. R5-145-10. By that time, she had over thirty years of experience in elementary education as a teacher and administrator. R5-145-10-13, Exh. 42. Fitzpatrick began teaching in White County in 1984 as a middle school teacher and athletic coach. He became assistant principal at White County Elementary School in 1998. R5-154-6-10. Other than the present case, Petitioners introduced no evidence that Allegood or Fitzpatrick had failed to respond appropriately to any allegation of child abuse at any time throughout their long careers.[11] In fact, Wilson was the only teacher

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[9] O.C.G.A. § 20-2-982 *et seq.*

[10] Based on the 2000 census, the population was slightly less than 20,000. *See* http://quickfacts.census.gov/qfd/states/13/13311.html

[11] Unless, that is, one includes as evidence of an "inappropriate" response to allegations of "child abuse" Petitioners'

(Continued on following page)

with whom Allegood has worked who has been accused of sexually molesting students. R5-145-27.

Respondents did not know about the alleged sexual touching of A.C. and M.D. prior to September 29, 2003, a fact that Petitioners acknowledge. R5-168-86, 179; R5-163-65. Although A.C. and M.D. testified that sexual touching occurred, Respondents do not concede that it did.[12] They made this clear at least three times below.[13] The District Court understood Respondents' position and, for purposes of ruling on

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utterly absurd assertion that Allegood instructed a teacher to speak first to the parents of a second grade student who was masturbating in class rather than immediately report the conduct to DFACS. It is noteworthy, too, that 52 of the 362 reports of child abuse in the WCSD came from Mount Yonah and the school's counselor had 278 contacts with DFACS since 2000. R3-110-Attach. #1-¶ 5.

[12] Respondents contend that there is reason to doubt the allegations for a number of reasons, not the least of which are the nature of the alleged touching and the circumstances in which it presumably occurred – information Petitioners do not provide this Court. A.C. and M.D. allege that Wilson touched their fully clothed breasts and buttocks either in the classroom or while walking in the hall – *always* in the presence of other students, *never* when they were *alone* with him. R5-168-68,193; R5-163-61,64,151,160,167-69,174-77; R5-166-154-55. Yet no students in the class and no students or teachers in the hall ever reported observing this conduct.

[13] Respondents do not understand why Petitioners continue to state otherwise. Petition at 3 ("There is no dispute that the girls were molested by Wilson."). *See* R3-110, Attach. #4, n.3; Brief of Appellants before the Eleventh Circuit, n.3; Reply Brief of Appellants before the Eleventh Circuit, n.2.

their summary judgment motion, *assumed* the allegations of sexual abuse to be true.[14]

In the District Court, Petitioners introduced ten incidents purporting to prove notice and deliberate indifference on the part of Respondents. This evidence, they argued, entitled them to a jury trial on both the Title IX and section 1983 counts. Yet counsel of record before this Court has pared down the Petitioners' original list of "notice" incidents from ten to seven.[15] The omitted incidents seriously undermine the sexual abuse narrative central to Petitioners' "cumulative effect" theory of deliberate indifference.

None of the omitted incidents has anything to do with female students, sexually inappropriate

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[14] Pet. App. at 28.

[15] The three "notice" incidents omitted from Petitioners' discussion here are:

(a) "A teacher was alone with Wilson in his classroom reviewing a lesson plan when Wilson touched her forearm and told her how lucky her husband was. The comment made her uncomfortable."

(b) "The parents of D.C. (who had no knowledge of the other complaints about Wilson) requested that *he* be removed from Wilson's class and had D.C.'s doctor provide a letter to Ms. Allegood asking for his removal because of the headaches D.C. was experiencing in the class." (italics supplied).

(c) "A teacher reported a concern that Wilson was allowing the children in his class to name a mini-society the 'bikini bottom' society." R4-130-3-5.

touching or with sex more generally.[16] Also, none of the incident reporters characterized these incidents at the time as having a sexual component. Nevertheless, Petitioners have repeatedly faulted Respondents for failing to see something that no one else saw. If the logic of Petitioners' "cumulative effect" standard[17] is applied with consistency, Petitioners must take the "bitter with the sweet."[18] When opposing a motion for summary judgment, the non-moving party is entitled to have the evidence in the record viewed in its most favorable light. But this means *all* the evidence in the record; the non-moving party does not get to pick and choose which evidence the court should consider when the non-movant's own evidence contradicts its case. Here as will be seen, the most favorable view that can be taken of the evidence in this record is less favorable to the Petitioners' position than would have

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[16] Despite the sexually suggestive connotation of "bikini bottom," it actually is of benign origin. "Bikini Bottom" is where Sponge Bob Square Pants, a cartoon character popular with third grade school children, lives. Apparently, counsel for Petitioners below were a bit behind the popular culture curve when they put this on their list of ten incidents giving notice of sexually inappropriate conduct on someone's part.

[17] Petitioners quote the District Court approvingly: "The cumulative effect of these complaints *should* have placed Allegood on notice that Wilson was engaging in sexually inappropriate conduct with his students." (emphasis added) (Pet. at 7; Pet. App. at 26). In a closely related setting, this Court has characterized this language as a description of a negligence standard. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999), discussed *infra* at 24-25.

[18] *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (Rehnquist, J.).

been true if they had never introduced it in the first place.

The seven "notice" incidents that Petitioners rely upon here are juxtaposed for discussion in a sequence that artificially suggests a "cumulative" relationship among the incidents over a two-year period. They do not discuss these "notice" incidents in chronological order or place them on a timeline showing the temporal gaps between them, the significant variation in the substance of the reports, the identity of the reporters or the fact that, with one exception to be discussed, not one of the reporters of these seven *at the time* characterized the teacher's actions as having a sexual component.[19] Petitioners here and below employ language such as "crotch" and "stroking" to sensationalize an incident when the reporter did not use the words or subscribe to the connotation at the time.[20] Petitioners' calculated generalizations also

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[19] One first year teacher, Deborah Anderson, reported four of the ten incidents, some that year, others not until she was interviewed by the GBI during its investigation of Petitioners' allegations. She was regularly in Wilson's classroom during the 2001-2002 school year. App. at 2 & 3.

[20] For example, Anderson stated, "I never used the word 'stroking.' It's just not a word I would use. . . . He would play with their hair . . . Just like little girls do. Just playing and rubbing his fingers through their hair." In response to the question, "did that make you uncomfortable?" Anderson said, "No, *not at the time*," only after the "allegations came out." R5-158-46-47 (emphasis added). Similarly, Anderson did not use the word "crotch" when describing to the GBI how the children laid their heads on his outstretched leg as he held a book and read to

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obscure hearsay and competency objections to evidence offered in support of at least three "notice" incidents.[21] Finally, Petitioners assail Respondents for failing to investigate these "notice" incidents, yet they do not tender a shred of evidence showing what a competent investigation of even one of these incidents would have revealed. Without such proof, as will be discussed, Petitioners have no evidence of causation.

Respondents here will discuss only two of Petitioners' seven incidents. Petitioners apparently regard these two as their most compelling. The remaining five incidents are so trivial that the "facts" surrounding them are set forth in a chart in the Respondents' Appendix at 1-4.

The H.C. incident is the centerpiece of Petitioners' deliberate indifference argument. It is also the *only* incident that involved any allegation of "sexually

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them in the presence of his paraprofessional. R5-158-45,118-120, 122. These were two of the incidents Anderson did not report to anyone except the GBI well after the fact.

[21] With respect to J.P. crying in the bathroom, all of the testimony about what allegedly happened is hearsay. The same is true of the unidentified child who went to the school nurse with a scratch. There is no evidence identifying the child, explaining how the child came to be scratched or revealing who, if anyone, asked her not to tell. R5-148-55-56, 87-89. Finally, the witness who testified about how Wilson allegedly leaned over a student did not see it happen. The Good Touch/Bad Touch teacher who actually observed it was not deposed or asked to describe what she saw.

inappropriate" touching. It occurred in November of 2002 and, chronologically, was the last in time of Petitioners' original ten notice incidents, nearly a year before Petitioners' allegations. The Georgia Department of Family and Children Services (DFACS), one of the agencies in the Georgia mandatory reporting statute with jurisdiction to investigate child abuse, investigated this incident.[22] DFACS deemed H.C.'s allegations to be "unsubstantiated," "closed" the case and noted in its records that the "[m]other said she felt confident that nothing happened as did father." R3-117.[23] Thus, Allegood's notice consisted of information that Wilson had *not*, in fact, touched H.C. in a sexually inappropriate way.[24] Amazingly, Petitioners did not

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[22] Petitioners suggest that Allegood failed to report the H.C. allegation to DFACS, without disclosing to the Court that H.C.'s parent told Allegood it had been reported to DFACS that day and the investigator was at the school just hours later. R3-117; R5-145-70. Both Petitioners and the District Court also criticize Allegood for not conducting her own investigation, ignoring the undisputed evidence that DFACS considers it "inappropriate for school employees to conduct their own investigation as that could interfere with the investigation DFACS or law enforcement is conducting." R5-138-Attach. #2-¶ 7.

[23] The Petition states that DFACS made no "substantial finding" in an effort to suggest that the conclusion was equivocal. Pet. at 5. But this is a quote, not from the DFACS records, but from Allegood's deposition, where the context clearly indicates she meant DFACS found nothing of substance or made no "substantive" finding.

[24] Petitioners state that Allegood was told that Wilson touched H.C.'s "upper thigh." Pet. at 4. The only possible source for this suggestive characterization would be Allegood's deposition. Allegood's exact words were that the touching, if it

(Continued on following page)

offer any evidence – whether by deposition, sworn statement or affidavit – from H.C.'s parents or from H.C. herself about what happened in Wilson's class.[25] Nor did Petitioners offer evidence from any parent in H.C.'s class or from teachers regularly in or near H.C.'s classroom.[26]

Respondent Allegood and the WCSD superintendent were notified of the DFACS conclusion. Even before the investigation was completed, on the very day H.C.'s parents made the allegation, Allegood removed H.C. from Wilson's class and admonished Wilson not to touch a student in any way that could be "misperceived." R3-110-Attach. # 6; R5-145-72-73, 78. This information was disclosed in Respondents'

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occurred, was of H.C.'s "leg," "knee" or "thigh." R5-145-60-83, 184-85, Exh. 43. She never used the adjective "upper" that Petitioners add to the story for effect.

[25] Petitioners apparently believe the inclusion of the H.C. incident in the indictment of Wilson is such evidence. Of course, it is not. Moreover, there is no way to find out what the grand jury was told about the DFACS finding, if anything, especially the statement of agreement attributed to H.C.'s mother. In Georgia, grand jury testimony is not only secret, as is true in other states, but grand jury proceedings are not even transcribed.

[26] Petitioners may complain that the District Court restricted their ability to obtain this evidence by "bifurcating" discovery and refusing to permit them to depose students. But the Court did no such thing as it stated in its Order denying summary judgment. Pet. App. at 19. Instead, it imposed a thirty-day deadline on Respondents to file the motion for summary judgment and urged the parties to avoid deposing students unless required on the issue of actual notice. R6-118-46-47.

interrogatory responses below. But when Petitioners deposed Allegood, they did not ask her whether she disciplined Wilson in any way concerning H.C.'s allegations.

Petitioners suggest that Allegood should have reported the "unsubstantiated" allegations against Wilson to the Georgia Professional Standards Commission (PSC). Pet. at 5. Petitioners, however, offered no evidence below showing what another investigation of the H.C. allegations would have revealed. Nor did they produce a single witness – from the PSC or otherwise – supporting their claim that the "unsubstantiated" H.C. incident should have been reported to the Commission.

Similar shortcomings apply to a mother's foot and shoulder massage allegations. Petitioners had every incentive to find a competent witness to establish that Wilson had a practice of getting students to engage in such massages with each other and with him. Even the most casual observer would find this activity to be unusual and noteworthy in the school setting. If the practice existed as alleged, surely Petitioners could have found at least one witness with personal knowledge. The massages allegedly occurred in the classroom with all the students in the class present. Two of Petitioners' witnesses – Deborah Anderson and Maxine Potschka – spent considerable time in Wilson's classroom. Potschka was Wilson's paraprofessional for two years and was in the classroom on a daily basis. She considered him a "fantastic teacher," "one of the best

teachers she had ever seen," and testified that she had "never seen Wilson do anything that I thought was inappropriate and I always felt welcome in his class." R4-160. Neither Anderson nor Potschka substantiated the foot and shoulder massage allegations.

Allegood acknowledged in her deposition that she had no recollection of the mother's foot and shoulder massage complaint and neither did Fitzpatrick. R5-145-114-115; R5-154-67-72. If the mother made the complaint, it is perhaps understandable that they might not remember it. The mother had no first hand knowledge of the foot and shoulder massages and, in any event, admitted never using the word "sexual" to describe them. R5-152-21, 85. The mother also had an undisputed penchant for the bizarre.[27] Allegood and Fitzpatrick simply may have dismissed the mother's report as too far-fetched to require investigation. Essentially, Petitioners want to fault them for not investigating something that never happened as far as the record in this case reflects.

Overall, Petitioners' proof in response to Respondents' motion for summary judgment not only fails to establish notice of any sexually inappropriate conduct on the teacher's part, it also fails to establish that the underlying incidents allegedly giving such notice actually happened. In addition, Petitioners' proof fails utterly to demonstrate what a better investigation of these incidents would have revealed and, thus, they

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[27] *See* App. at 2.

literally have no competent evidence of causation in this record.

Nearly a year after H.C.'s allegation, on September 29, 2003, A.C. and her parents reported to Allegood and Fitzpatrick that Wilson was touching her inappropriately in the classroom. R5-167-55. Allegood and Fitzpatrick met with Wilson that day and then again with A.C. and her parents. R5-145-132; R5-154-23-24. Allegood offered to transfer A.C. from the classroom, but A.C. and her parents decided she would remain in Wilson's class.[28] R5-145-134; R5-154-22, 25,27; R5-162-63,66; R5-164-32,63-64. However, that evening A.C. told her best friend, M.D., about her allegations and M.D. then told her mother that Wilson had been touching her as well. R5-168-38,119; R5-163-58,116-117; R5-166-44. After M.D.'s parents called the sheriff's department, the two families and the girls met together with the deputy that evening. R5-167-73; R5-162-32-34; R5-166-50-52. The following day, September 30th, neither A.C. nor M.D. attended school. R5-163-125. Instead, M.D. and her parents reported her allegations to Allegood. R5-163-121-22. Both girls were transferred out of his class, and a full time paraprofessional was placed in the class for two

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[28] Without citation to the record, the District Court stated that Allegood "told" A.C. she must be mistaken about Wilson. In fact, according to A.C., Allegood **asked** her whether she could have been mistaken, hardly a surprising question in light of the vague description A.C. gave of the circumstances of the alleged touching. [A.C. stated at her deposition, "I can remember Ms. Allegood saying are you sure you're not mistaken." R5-168-109].

days while the superintendent worked with the sheriff's department to investigate the allegations. R5-167-81; R5-155-37,53. On October 2nd, the superintendent told Wilson not to return to school. R5-155-55-58. While the criminal investigation proceeded, the School District initiated the formal process of terminating Wilson's contract. In lieu of a hearing under Georgia's Fair Dismissal Act, O.C.G.A. § 20-2-940 *et seq.*, Wilson submitted his resignation. R5-155-83. He never returned to school after October 2nd, and once A.C. and M.D. reported his conduct to Allegood, neither they, nor any other students, were harmed by Wilson. R5-155-83; R5-163-126; R5-168-146-7,179.

B. Case Actually Litigated Below

Petitioners' argument for certiorari rests on a claimed inter-circuit conflict concerning the formulation of the "deliberate indifference" standard under both Title IX and section 1983. The Eleventh Circuit, they assert, is out of step with the law in other circuits. They urge the Court to use this case as a "vehicle" to clarify the law and to announce a version of the deliberate indifference standard less rigorous than the Eleventh Circuit's. But, as will be shown, counsel for Petitioners below *never* advanced these arguments. Petitioners' filings included a brief in opposition to Respondents' motion for summary judgment in the District Court and five submissions in the Eleventh Circuit: (a) two briefs addressing the court's interlocutory jurisdiction, (b) a brief on the merits, (c) a notice of supplementary authority and

(d) a petition for rehearing en banc. Not once in these submissions did Petitioners compose a sentence questioning Eleventh Circuit precedent. Indeed, Petitioners embraced Eleventh Circuit authority enthusiastically, uncritically and almost exclusively in arguing that they had satisfied the "deliberate indifference" standard under Title IX and section 1983.[29]

A breakdown of Petitioners' deliberate indifference arguments below follows:

1. In the District Court, Petitioners relied exclusively on and did not challenge either this Court's decision in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), or Eleventh Circuit authority in addressing Title IX liability.[30]

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[29] As a rough measure of the extensiveness of the repackaging of this case, consider the pattern among the 106 cases cited and discussed in the Petition. Leaving aside nine Supreme Court cases and ten cases from the Eleventh Circuit, Petitioners cite eighty-seven cases. Eighty-five are federal circuit court opinions and two are federal district court opinions. All are from outside the Eleventh Circuit. Interestingly, counsel for Petitioners below cited only one of those eighty-seven cases and that was for a proposition unrelated to the deliberate indifference standard. *See Doe v. Claiborne County, Tennessee*, 103 F.3d 495, 506 (6th Cir. 1996) (one of six cases cited in footnote two of Petitioners' Brief in the District Court; for the proposition that student has "liberty interest . . . in freedom from bodily injury" that cannot be violated by public school teacher).

[30] *Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279 (11th Cir. 2005); *Davis v. Dekalb County Sch. Dist.*, 233 F.3d 1367 (11th Cir. 2000); *Floyd v. Waiters*, 171 F.3d 1264 (11th Cir. 1999); *Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998).

R4-130-6-14. Petitioners did not cite a single case involving the application of the deliberate indifference standard to supervisory liability claims under section 1983, arguing instead that Allegood and Fitzpatrick were not entitled to qualified immunity simply because the constitutional right to "bodily integrity" was clearly established; they did not discuss the application of the "deliberate indifference" standard to Respondents individually at all. R4-130-20-22.

2. In the Eleventh Circuit, Petitioners changed course somewhat. They argued that Allegood and Fitzpatrick were not entitled to qualified immunity on the supervisory liability claim because (a) the right to "bodily integrity" was clearly established, and (b) Petitioners had submitted evidence of "actual notice" and "deliberate indifference." In support of the latter point, they relied on the same Title IX cases they had cited from this Court and the Eleventh Circuit in the District Court and one new one.[31] These citations were accompanied by virtually no discussion, much less criticism, of the

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[31] *Williams v. Bd. of Regents*, 441 F.3d 1287 (11th Cir. 2006). They also cited an Eleventh Circuit case addressing the supervisory liability standard, *Braddy v. Fla. Dep't of Labor & Empl. Sec.*, 133 F.3d 797 (11th Cir. 1998), in their quotation from the District Court's opinion. But they did not discuss it, apply it, or criticize it.

Eleventh Circuit's formulation of the deliberate indifference standard. They simply insisted that their evidence met the standard. Their Title IX discussion focused only on whether Allegood was an "appropriate person" to receive notice under *Gebser,* referring back to their argument on section 1983 qualified immunity and supervisory liability on the issues of actual notice and deliberate indifference.

3. On the eve of oral argument, Petitioners filed a notice of supplemental authority, all cases from the Eleventh Circuit. One of the cases was *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007), denying a motion to dismiss Title IX claims on the grounds that the allegations were sufficient to demonstrate deliberate indifference.[32] Again, Petitioners did not express any misgiving about the soundness of Eleventh Circuit precedent or show any interest in precedent from other circuits.

4. Petitioners next filed a Petition for Rehearing en banc. The main objection to the panel opinion was the Eleventh Circuit's lack of jurisdiction to consider Respondents' qualified immunity appeal. Petitioners also complained that the

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[32] The panel vacated its earlier decision in 2006, *infra* at n.31, and substituted the above-cited opinion.

panel's application of the Eleventh Circuit's deliberate indifference standard was too demanding. The only case cited for this proposition was another Eleventh Circuit case: *Mathews v. Crosby*, 480 F.3d 1265 (11th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 183 (U.S. Jan. 7, 2008), a case permitting a supervisory liability claim to go to trial. *Mathews* belies Petitioners' assertion that the Eleventh Circuit's standard is so strict that it has never been met in the last decade. Pet. at 24. At no point, in this Petition for Rehearing en banc, or in any other submission, did Petitioners ask the Eleventh Circuit to consider an alternative formulation of the deliberate indifference standard from another Circuit.

REASONS FOR DENYING THE WRIT

A. Questions for Which Review Is Sought Not Preserved Below

In determining whether to grant the writ, this Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987). *Kibbe* was a section 1983 case involving *Monell* liability. The Court granted certiorari to review the City of Springfield's argument that plaintiff had to show more than negligence or gross negligence to establish municipal

liability. In Kibbe's brief on the merits, the following argument appears:

> Having consistently maintained in the District Court and Court of Appeals that municipal liability could be based on inadequate training and supervision, and having previously embraced a gross negligence standard, petitioner in this Court denounces the lower courts for applying those very principles. Petitioner's eleventh hour reversal of its position may be a deft response to the failure of its evidentiary arguments, but both Rule 51 and the established practice of this Court preclude a petitioner from relying here on contentions which it never preserved or raised below.[33]

The Court dismissed the writ as improvidently granted. It was persuaded by Kibbe's argument and by a similar argument in the ACLU's amicus brief opposing certiorari.[34] The Court made two points pertinent to the present case. First, the City of Springfield did not properly object to a jury charge at the trial level and did not argue for a "higher

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[33] *City of Springfield v. Kibbe*, No. 85-1217 Brief for Respondent, 1986 U.S. S.Ct. Briefs LEXIS 511 at 22-23. One of the co-authors of the language in the *Kibbe* brief is Counsel of Record in the petition for certiorari now under review. He did not appear in the case below.

[34] *City of Springfield v. Kibbe*, No. 85-1217 Amicus Curiae of the American Civil Liberties Union and Civil Liberties Union of Massachusetts, 1986 U.S. S.Ct. Briefs LEXIS 514 at 6-11.

standard than gross negligence in the Court of Appeals." *480 U.S. at 258. Second, petitioner informed* the Court of "no special circumstances explaining its failure to preserve this question," 480 U.S. at 259-60. The Court concluded that the case was an "inappropriate vehicle for resolving the inadequate training question. . . ." 480 U.S. at 259.[35]

The reasoning and principles described in *Kibbe* speak directly to the present Petition. Petitioners claim that (a) the courts of appeals are seriously fragmented in their approach both to supervisory liability under section 1983 and to entity liability under Title IX and (b) the Eleventh Circuit formulation of the deliberate indifference standard is one of the most restrictive of all. They insist that "this case is an excellent vehicle for addressing the standard for supervisory liability in a section 1983 case" and that lower court misinterpretation of *Gebser* makes review of the Title IX ruling in this case a matter of urgency. Pet. at 28, 37. They ask the Court to address what they describe as inter-circuit splits and to reformulate

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[35] Although the Court has the power to rule on issues not presented in the lower courts, there are few instances where the Court has chosen to take such a path. When the Court has done so, one of the key considerations is whether the respondent has affirmatively argued either in its brief in opposition or its brief on the merits the failure to preserve. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 814 n.2 (1985) (failure to preserve not argued); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (failure to preserve not argued). Here, as in *Kibbe*, Respondents make the failure to preserve argument at the earliest opportunity to do so.

the deliberate indifference standard under Title IX and section 1983.[36] But Petitioners accepted Eleventh Circuit precedent totally until they lost on appeal. Now they "denounce" the precedent they once warmly embraced, using arguments that no judge below has had the opportunity to consider. A more complete and "deft" reversal of course is difficult to imagine. Based on the reasoning in *Kibbe*, the writ should be denied.

B. Petitioners' Inter-Circuit Split Is "More Semantic Than Real":[37] the Eleventh Circuit's Decision Is Correct Under *Any* Formulation of the "Deliberate Indifference" Standard

Petitioners' description of the case below incorrectly characterizes the ruling of the District Court and distorts the Eleventh Circuit's formulation of the deliberate indifference standard. The District Court erred because it applied a negligence standard to hold that Petitioners were entitled to go to trial on their Title IX and section 1983 claims. Petitioners' inter-circuit conflict argument is immaterial to this case. On the facts presented below, Petitioners' claims could not survive a motion for summary judgment

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[36] Indeed, as discussed *infra* at 30-33, Petitioners are, in essence, asking the Court to abandon the deliberate indifference standard and substitute a negligence standard of liability.

[37] *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 151 (2000).

under the deliberate indifference standard of any circuit. Even if some circuit courts, including the Eleventh Circuit, apply an unduly rigorous version of the deliberate indifference standard under Title IX and section 1983, this case is not the "excellent vehicle" for changing or clarifying the law that Petitioners suggest. To the contrary, Petitioners ask this Court to grant the writ to address an argument never made below when its ultimate conclusion would have to be that the Eleventh Circuit ruled correctly. The Court does not sit to render such advisory opinions.[38]

1. Deliberate Indifference Distinguished from Negligence

The decisions of this Court make clear that under Title IX and section 1983 there is no vicarious or respondeat superior liability[39] and no liability based

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[38] *Clinton v. Jones*, 520 U.S. 681, 700 n.33 (1997) ("[T]he judicial power to decide cases and controversies does not include the provision of purely advisory opinions. . . .").

[39] *Gebser v. Lago Vista Indep. Sch. Dist.*, *supra*; *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997) ("We also recognized that a municipality may not be held liable under § 1983 solely because it employs a tortfeasor. . . . We have consistently refused to hold municipalities liable under a theory of *respondeat superior*."); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) ("[P]ermitting cases against cities . . . to go forward under § 1983 on a lesser standard of fault [than deliberate indifference] would result in *de facto respondeat superior* liability.").

on negligence.[40] They also make clear that deliberate indifference is a more rigorous standard of culpability than negligence.[41] This Court has carefully differentiated between deliberate indifference and negligence in several distinct but closely relating settings. For example, this Court, referring to its decision in *Gebser* observed:

> [W]e rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. . . . Likewise, we declined the invitation to impose liability *under what amounted to a negligence standard – holding the district liable for its failure to react to teacher-student harassment of which it knew or should have known.* . . . Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by

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[40] *Daniels v. Williams*, 474 U.S. 327, 330-31 & n.3 (1986) ("[W]e agree and overrule *Parratt* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment."); *but see Graham v. Connor,* 490 U.S. 386, 395, 397 (1989) ("Today we make explicit . . . that *all* claims [of] excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . " and "the 'reasonableness' inquiry in an excessive force case is an objective one . . . without regard to their underlying intent or motivation.") (in original).

[41] *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) ("[D]eliberate indifference describes a state of mind more blameworthy than negligence.").

> remaining deliberately indifferent to acts of teacher-student harassment of which it had *actual knowledge*. (citations omitted) (italics supplied).

Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642 (1999). *Gebser*, it will be recalled, equated "constructive notice" with "knew or 'should have known'" terminology commonly associated with negligence based tort liability. 524 U.S. at 282.[42]

A similar delineation exists in this Court's *Monell* decisions. For example, in *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), the Court noted:

> Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, *rigorous* standards of culpability and causation must be applied to insure that the municipality is not held liable solely for the actions of its employee.

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[42] A recent Georgia example of this "knew or should have known" terminology appears in a case involving a negligent hiring claim against a security company whose employee kidnapped a homeowner. *See Underberg v. Southern Alarm, Inc.*, 284 Ga. App. 108, 110, 643 S.E.2d 374, 377 (2007) ("The question is not only whether Southern Alarm owed a duty to Fields but whether it breached that duty. These are questions of fact that a jury must resolve. 'The appropriate standard of care in a negligent hiring/retention action is whether the employer knew *or should have known* the employee was not suited for the particular employment.'") (citations omitted; emphasis in original).

Id. at 405 (italics supplied). It went on to declare that to hold a municipality liable under section 1983, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or *obvious* consequences. . . . A showing of *simple* or even *heightened negligence* will not suffice." *Id.* at 407 (italics supplied). The majority used the phrase *plainly obvious* eight times to emphasize the degree to which the evidence must point compellingly to a "risk that a violation of a particular constitutional or statutory right will follow. . . ." *Id.* at 411. In other words, a *Monell* defendant may be held liable under *Brown* when the evidence so strongly points towards culpable knowledge that a reasonable jury could infer deliberate indifference to constitutional harm notwithstanding a defendant's denials. In the criminal and increasingly in the civil setting, if a case reaches the jury, this circumstance is addressed through the use of willful blindness or conscious avoidance instructions.[43]

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[43] *United States v. Etheredge*, 2007 WL 3052856 (4th Cir. Oct. 19, 2007) ("The jury could infer that Etheredge 'deliberate[ly] ignor[ed]' the illegal source of Nicholson's income and the illegal nature of the transactions designed to conceal that income in which Etheredge himself participated. Moreover, the district court properly instructed the jury not to infer 'guilty knowledge from a mere showing of careless disregard or mistake.' . . . [T]he court did not abuse its discretion in instructing on willful blindness." *United States v. Carlo*, 507 F.3d 799, 802-03 (2nd Cir. 2007) ("Carlo's objection to the conscious avoidance instruction is similarly without merit . . . We find that the government introduced evidence that Carlo was aware of a high probability that

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This is well-traveled ground as *Farmer v. Brennan*, 511 U.S. 825 (1994) recognizes. In *Farmer*, the plaintiff asserted an Eighth Amendment inhumane prison conditions claim under *Bivens*. The Court analyzed the difference between objective and subjective versions of the deliberate indifference standard, noting at the outset "deliberate indifference describes a state of mind more blameworthy than negligence." *Id.* at 835. Comparing the two versions, it deemed the deliberate indifference standard under *Monell* to be objective because liability could be based on the *obviousness* of "an unjustifiably high risk of harm." *Id.* at 836. An objective standard made sense because of the "conceptual difficulty" of imputing a subjective state of mind to a governmental entity. *Id.* at 841. At least for Eighth Amendment purposes, a subjective version of deliberate indifference was found to be appropriate because the subjective standard applied to a person capable of a discernible mental state. Accordingly, the Court ruled that a prison official cannot be found liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial

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the information about credit enhancement that he received from his contacts in Europe (which he then repeated to the developers) was false, and if he did not actually know that the information was false, it was only because he deliberately avoided confirming his suspicion."); *see, e.g., Microsoft Corp. v. Rechanik*, 2007 WL 2859800 *2 (7th Cir. Oct. 2, 2007) (standard applied in the civil setting).

risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

Responding to the argument that a purely subjective version of deliberate indifference would give prison officials freedom to "ignore the obvious," the Court in *Farmer* sought to allay the concern. It recognized that there would be cases on the boundary between deliberate indifference and negligence. In such cases, the risk of harm would have to be "obvious" in a rigorous sense to permit a jury to draw the inference of culpable knowledge. To constitute such obviousness, the Court explained that the substantial risk of harm – inmate on inmate attacks in *Farmer* – would have to be "longstanding, pervasive, well-documented." *Id.* at 843. The Court's emphasis on the repetition, duration and scope of this evidence seems calculated to insure that the boundary line cases that reach the jury – as a class – are as close to the actual knowledge end of the culpability continuum as possible. The focus then is on what was in the defendant's mind as a matter of historical fact, not on what the jury believes a reasonable person *should* have known. *Id.* at 842-43 (italics supplied). As will be seen, the language of differentiation in *Farmer* strongly resembles language used by the Eleventh Circuit below. This language is missing almost entirely from the District Court's opinion.

2. The District Court Below Applied a Negligence Standard

In holding that Petitioners' case was sufficient to withstand Respondents' summary judgment motion, the Court was conclusory in its treatment of the evidence:

> If each [of the ten] incident[s] were considered separately as it was reported, these incidents may not have risen to the level of actual notice under *Gebser*. However, the cumulative effect of these complaints *should have placed Allegood on notice* that Wilson was engaging in sexually inappropriate conduct with his students. Pet. App. at 26 (italics supplied).

At that juncture, Respondents' lack of "actual notice" should have been dispositive of both the Title IX and section 1983 claims.

Instead, using the language of negligence disavowed in *Gebser* and *Davis*, the District Court resurrected the case for Petitioners. It held that the "cumulative effect" of the complaints "should have placed" Allegood (and Fitzpatrick)[44] "on notice that Wilson was engaging in sexually inappropriate conduct with his students." Pet. App. at 26. The Court ruled that this crucial, though erroneous, finding satisfied the requirements of both Title IX and section

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[44] The District Court treated Allegood and Fitzpatrick as equally culpable even though the evidence relating to Fitzpatrick was much weaker both qualitatively and quantitatively.

1983 supervisory liability. This finding, however, had nothing to do with the Respondents' actual mental state, but rather reflected what the Court thought they should have known based on the reasonable person standard. That is not the law in the Eleventh Circuit, nor is it the law in this Court. Conspicuously missing from the District Court's opinion is any discussion of whether Petitioners' evidence was so "plainly obvious" in pointing toward sexually inappropriate conduct that a jury could conclude that the Respondents had actual notice of the risk even though they denied it.[45]

3. The Eleventh Circuit Properly Reversed the District Court

Respondents did not then and do not now believe that Petitioners' evidence came close to meeting that standard and the Eleventh Circuit agreed.

> The facts alleged do not show either defendant (1) had notice Wilson was a threat to students through a history of widespread abuse of students by Wilson, (2) knew Wilson would abuse students and failed to stop him, or (3) instituted an improper custom or policy

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[45] The District Court did use the words, "a history of widespread abuse," without any analysis to conclude summarily that "as discussed above," the evidence indicates that Respondents were on notice that "Wilson was sexually abusing his students. . . ." Pet. App. at 31.

> that resulted in deliberate indifference to students' constitutional rights.

Pet. App. at 6.

Contrary to Petitioners' assertion, the Eleventh Circuit did not require proof that Respondents had actual notice of prior unconstitutional acts on the part of Wilson before a duty to investigate arose. The court only required notice of a "threat to students" or a "need to correct unconstitutional conduct" through evidence of a compelling nature. Pet. App. at 5 and 6. The court also wrote of finding liability if the "supervisor knew that subordinates would act unlawfully and failed to stop them from doing so." Pet. App. at 5. This language is considerably less restrictive than Petitioners' acknowledge. Petitioners state categorically that "[n]o Eleventh Circuit decision in the last decade has found the evidence sufficient to satisfy" its "extremely rigorous" formulation of the deliberate indifference standard. That statement is wrong. Petitioners below cited and relied on two cases in which the plaintiffs' cases met the Eleventh Circuit's deliberate indifference standard.[46]

Given the thousands of supervisory liability cases litigated over the years, it is not surprising that Petitioners might find variations in the formulation

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[46] *Mathews v. Crosby*, 480 F.3d 1265 (11th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 183 (Jan. 7, 2008) (section 1983) and *Williams v. Bd. of Regents*, 441 F.2d 1287 (11th Cir. 2006) (Title IX); *see also, Valdez v. Crosby*, 450 F.3d 1231 (11th Cir. 2006).

of the deliberate indifference standard. Opinion writing is an art, not a science. But the best test here is whether, amidst the welter of circuit court decisions they cite, Petitioners can find just one from any circuit that *plainly and obviously* would conflict with the result reached by the Eleventh Circuit below. They have not cited one thus far, and Respondents do not believe such a case exists. Imposing civil liability on a supervisor or a governmental entity for the criminal act of a subordinate should not be a routine matter. What Petitioners really want from this Court is not a clarification of the deliberate indifference standard but a dilution of it to the point that it is the functional equivalent of negligence.[47] In short, they want civil rights liability to mirror state tort law much more closely.[48] Even if this case were properly positioned for review, Petitioners want the Court to change the direction of the law as it has developed in

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[47] As the Court no doubt understands, the key to litigating civil rights cases for plaintiffs is getting to the jury. Settlement leverage would increase substantially under the Petitioners' watered-down version of the deliberate indifference standard. Petitioners' argument cuts against the grain of this Court's rulings differentiating between deliberate indifference and negligence.

[48] Why else would Petitioners refer to "tort principles that were well established when section 1983 was enacted?" Pet. at 29. Or use an example from tort law favoring the imposition of liability when the owner of a "car or a pet" posing a "substantial risk" to third parties fails to take "reasonable steps to prevent" injuries? Pet. at 29.

section 1983 and Title IX cases over the past fifteen years.

4. Petitioners' Solution to the Alleged Judicial "Deliberate Indifference" Muddle

Petitioners are highly critical of the language they have culled from the eighty-seven decisions that form the basis of their inter-circuit argument for the writ. On reading the Petitioners' proposed solutions, however, it is difficult to grasp how this newly minted language represents an improvement.

Under section 1983, the supervisory liability standard would be as follows:

> A supervisor who is *on notice* that a subordinate under his or her control poses a *substantial risk* of engaging in unconstitutional conduct, and who fails to take *reasonable* steps to prevent that conduct, can fairly be said to have caused the constitutional violation. Pet. at 29 (italics supplied).

Under Title IX, Petitioners propose a dramatic change to the deliberate indifference standard as articulated in *Gebser* and *Davis*. Petitioners would "clarify" the actual notice requirement by imposing liability whenever notice of misconduct is "sufficient to alert school authorities to the *possibility*" that a "teacher *might* engage in more serious abuse." Pet. 36-37 (italics supplied).

With all due respect, Petitioners propose one set of legal generalities to replace those currently in use in circuit court opinions across the country. There is nothing in the Petition to suggest that substantive outcomes in Title IX and supervisory liability cases vary in substantive result from circuit to circuit because of these language variations. Petitioners, however, assume, but do not show, that these variations matter greatly. Petitioners further assume – wrongly in Respondents' view – that their proposals will promote substantive legal uniformity over time under both Title IX and section 1983. That is a hope based on an assumption. If this Court were to adopt Petitioners' reformulation of the deliberate indifference standard, one consequence can be foretold. The change will shift the liability standard in Title IX and section 1983 cases far closer to the negligence standard repeatedly disavowed by this Court.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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APPENDIX

App. 1

PETITIONERS' NOTICE AND DELIBERATE INDIFFERENCE INCIDENTS

Alleged Incident	Sexual Touching Alleged	Alleged Observer or Reporter	Finding Donna Allegood ("DA") - Roger Fitzpatrick ("RF") - Joey Wilson ("JW")
1. Parents of HC, girl in JW's third grade class in 2002, complained JW rubbed her upper thigh.	Yes	Parents	• DFACS began investigation same morning parents reported incident to DA. (DA Dep. at 70). • DFACS determined allegations "unsubstantiate[d]." (Dooley Affidavit, Exh. p. 5). • DA and WCSD superintendent advised of this finding. ["There were no findings. The case is closed. There were no – there was no substantial finding." (DA Dep. at 82-83)]. • DFACS records show that parents of HC agreed that nothing happened. ["Mother said she felt confident nothing happened as did father." (Dooley Aff. Exh. p. 5)] • DA met with JW and counseled him not to touch students in a way that could be misperceived. (DA Interrogatory Response No. 4). [NOTE: DA not asked any questions at her deposition about what she said to JW about incident or whether he was disciplined or counseled in any way even though counsel for plaintiffs had DA's Interrogatory response at time of DA's deposition.]
2. Parent Kim Pontierre complained that JW had "girls" sit in circle and "massage" each other's feet, including his feet. Also had girls "massage" his shoulders.	No	Parent	• DA does not remember conversation with Pontierre to this effect. (DA Dep. at 114-15). • RF does not recall Pontierre reporting this conduct to him. (Fitzpatrick Dep. 66-67). • Pontierre agrees that she never used the word "sexual" to describe JW's conduct. (Pontierre Dep. at 18, 85, 88). • Plaintiffs produced not a single witness who saw this conduct. No other parent, student, teacher or administrator complained about this. • Kim Pontierre was source of many complaints, a number of which were exaggerated or unsubstantiated. (DA Dep. 114-115). Illustrating this point, Pontierre provided the following information at her deposition (not an exhaustive list): the GBI "lied" to her; she wants JW's body exhumed to determine cause of death; she believes JW broke into her house and was in her basement; when a girl at school was allegedly responsible for breaking her son's leg, the WCSD "shoved it under the rug" and the girl's family "threatened" her if she took it to court; when DA saw her walking on the square, DA almost ran into the car in front of her. (Pontierre Dep. 45, 56, 57, 59-61, 67).

Alleged Incident	Sexual Touching Alleged	Alleged Observer or Reporter	Finding Donna Allegood ("DA") - Roger Fitzpatrick ("RF") - Joey Wilson ("JW")
3. Teacher saw JW rubbing fingers through hair of girls.	No	Deborah Anderson	• At the time, JW conduct did **NOT** make Anderson "uncomfortable." (Anderson Dep. 46-47, 128) • Plaintiffs cite no record evidence that Anderson reported this to anyone (other than the GBI) except in connection with report she made as to JP in # 6 below.
4. Teacher, alone with JW discussing lesson plan, "touched" on forearm. Made uncomfor-table by comment.	No	Deborah Anderson	• DA told Anderson to discuss matter directly with JW. Anderson never raised issue with DA again even though regularly in JW's classroom during 2001-2002 school year. • Anderson did not report as sexual harassment and never used term "sexual harassment" to characterize this incident in conversation with DA. (Anderson Dep. 146). • Anderson continued working with JW and, during next school year, came to recognize him as good teacher and had good relationship with him. (Anderson Dep. 99-100; 150). • In response to Anderson report, DA asked nurse to obtain information on sexual harassment, held faculty meeting at which material passed out to all teachers. (Anderson Dep. 147-148).
5. JW sitting on floor reading to students; "girls" rested heads on his outstretched legs and "crotch."	No	Deborah Anderson Maxine Potschka	• At time of observation and report, neither reporter described touching as having sexual content. In first statement to GBI, Potschka did **not** mention the reading activity and stated,"I have never seen WILSON do anything that I thought was inappropriate and I always felt welcome in his class." She said he "seemed to be a **fantastic teacher**." In second statement to GBI, she again did **not** mention reading activity and said "WILSON was **one of best teachers she had ever seen**." (Potschka Declaration and Summary Statement to GBI). • Potschka worked in JW's classroom for two years and never raised the reading activity issue until this litigation. • Neither Anderson in her statement to the GBI nor Potschka in her Declaration used term "crotch" to describe position of students' heads. (Anderson Dep. 118).

Alleged Incident	Sexual Touching Alleged	Alleged Observer or Reporter	Finding Donna Allegood ("DA") - Roger Fitzpatrick ("RF") - Joey Wilson ("JW")
6. JP found crying in bathroom. JP said JW touching her, playing with her & giving her hugs.	No	Deborah Anderson Susan Holman (school nurse)	• JP crying because friends were mad at her. (Holman Dep. 64; Anderson Dep. 59). • Anderson did not see what JW allegedly did to JP; assumed he played with her hair in same way Anderson had seen before that did not trouble her. (Anderson Dep. p 128). • Anderson's contemporaneous notes of this incident make no reference to any touching other than the hair. (Anderson Dep. 129-130). • Anderson did not understand JP to be complaining about sexual abuse. (Anderson Dep. 130).
7. Child in JW's class went to nurse with scratch on neck & said she was told not to tell who did it.	No	Susan Holman (school nurse)	• Not reported as involving sexual contact. • No evidence that JW scratched child. • Holman not sure whether it was JW or someone else who told the child not to tell who scratched her. (Holman Dep. p. 55-56). • Holman discussed with DA who instructed her to talk with child again and observe if there is anything unusual. Holman did not see anything unusual and did not interview child again. (Holman Dep. 87-89). • Holman talked with JW and got explanation of scratch. (Holman Dep. 89). • Holman made no further report to DA or DFACS. (Holman Dep. 90).
8. DC's parents asked for him to be removed from JW's class due to headaches. DC is a boy.	No	Parents	• Neither DC nor parents ever reported concern about possible improper sexual conduct. (DA Dep. pp. 88-91, 95-102; Exh. P-44). • DA agreed to move DC to another class but family changed mind and agreed for DC to stay in class. (DA Dep. 96). • Doctor's letter did not state any concern about possible improper sexual conduct. (Exh. P-44).

Alleged Incident	Sexual Touching Alleged	Alleged Observer or Reporter	Finding Donna Allegood ("DA") - Roger Fitzpatrick ("RF") - Joey Wilson ("JW")
9. Wilson "leaned" over desk of student. "Concern" expressed by Good Touch/ Bad Touch instructor.	No	Kimberly Patrick	• Not reported as involving sexual contact. • No touching or contact at all
10. "Bikini Bottom" mini Society	No	Teacher	• No sexual content. • "Bikini Bottom" is name of place where Sponge Bob Square Pants, a cartoon popular among elementary school students, lives. (A.C. Dep. 27). • After report, DA went to classroom and discovered the Mini Society class project was not named "Bikini Bottom." (DA Dep. 127-128).

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In The Supreme Court of the United States

KEVIN DALE, *et al.*,

Petitioners,

v.

WHITE COUNTY, GEORGIA SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ARGUMENT

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE INTER-CIRCUIT CONFLICTS

This Court's decision in *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257 (1987), does not militate against a grant of certiorari in the instant case. In *Kibbe* the petitioner, after obtaining review regarding a different issue, sought to challenge the correctness of a particular jury instruction. In the district court, however, the petitioner had never disputed the instruction at issue; to the contrary, the petitioner had itself proposed an instruction that was the same, in relevant particulars, as the very jury instruction which it subsequently attacked in this Court. (480 U.S. at 258). It was at best unclear whether the appellate decision in *Kibbe* had even passed on the correctness of that instruction. (480 U.S. at 259). In refusing to permit the petitioner to challenge that instruction, the Court relied in particular on Rule 51 of the Federal Rules of Civil Procedure, which provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict." See 480 U.S. at 259 ("there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested.") The Court noted that the petitioner had offered no explanation of its failure to object to that instruction in the lower courts. 480 U.S. at 258-59.

Respondents argue that in the instant case the petitioners in the litigation below inexcusably failed in the courts below to challenge the controlling "Eleventh Circuit precedent."[1] Here, unlike *Kibbe*, there is an obvious and compelling explanation for the manner in which petitioners proceeded in the lower courts: the body of law which petitioners did not attack in the district court and court of appeals was binding Eleventh Circuit precedent. Respondents object that "[p]etitioners accepted Eleventh Circuit precedent totally until they lost on appeal." (Br. Op. 22). But in the litigation below, both the district judge and the appellate panel were required to follow Eleventh Circuit precedent.[2] In the Eleventh Circuit litigants are under the same obligation as district court and appellate judges to "accept[ ] Eleventh Circuit precedent." No decision of this Court requires,

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[1] Br. Op. i ("[p]etitioners did not . . . question the soundness of Eleventh Circuit precedent"), 16 (petitioners did not "question[ ] Eleventh Circuit precedent"), 17 (petitioners' appellate brief did not include "criticism . . . of the Eleventh Circuit[ ]"), 18 ("[p]etitioners did not express any misgiving about the soundness of Eleventh Circuit precedent.")

[2] "[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993). "The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision." *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997).

Eleventh Circuit Rule 36, I.O.P. 2 ("Under the law of this circuit, published opinions are binding precedent.")

or even encourages, litigants to make the futile if not vexatious gesture of urging lower court judges to disregard binding circuit precedent.

For example, the Eleventh Circuit "history of widespread abuse" standard governing section 1983 supervisory liability, which the district court and panel applied in this case, was controlling authority to which both the district court and the appellate panel were obligated to adhere. That circuit's "history of widespread abuse" requirement was first announced by the Eleventh Circuit more than twenty years ago. By the time of the appellate decision in the instant case, that standard had been reiterated in eighteen reported and eight unreported Eleventh Circuit decisions.[3] Virtually every member of the Eleventh Circuit had by then joined several of the decisions announcing this rule. The Eleventh Circuit itself had repeatedly described its standard governing supervisory liability as "well established" and "well settled."

Respondents also object that petitioners did not seek rehearing en banc with regard to the Eleventh Circuit's section 1983 supervisory liability standard. (Br. Op. 18-19). But this Court has never required litigants, as a precondition of certiorari, to first seek en banc review. En banc review imposes substantial burdens on the appellate courts, and is rarely granted. "En banc hearing or rehearing is not favored." Fed. R.

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[3] We set forth a list of those cases in an appendix to this brief.

App. P. 35(a). In the overwhelming majority of cases in which certiorari is granted by this Court, the petitioner had not sought en banc review. The Eleventh Circuit Rules limit en banc review in that circuit to cases in which a panel opinion is "in conflict with precedent of the Supreme Court or of this circuit." (11th Cir. Rule 35-3).[4] Thus the inter-circuit conflict described in the petition would not have been a legally sufficient basis on which to seek rehearing en banc in the Eleventh Circuit. Consistent with the practice of this Court, the Eleventh Circuit Rules emphasize that "the filing of a petition for . . . rehearing en banc is not a prerequisite to filing a petition for writ of certiorari." *Id.*

Respondents suggest that they might still prevail even if this Court were to adopt the less stringent section 1983 and Title IX standards utilized by circuits other than the Eleventh Circuit. (Br. Op. ii, 4, 23). If this Court were to reject the Eleventh Circuit's own standard regarding either supervisory liability or Title IX, the application of the proper standard would appropriately be left to the lower courts on remand. As the Brief in Opposition itself demonstrates, the facts of this case are complex and in important particulars are hotly disputed. (Br. Op. 5-15). The application of a different set of standards to that record

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[4] The Eleventh Circuit Rules also permit a petition for rehearing en banc if the panel decision is "precedent setting." 11th Cir. Rule 35-3. In this case, however, the precedent involved had been set many years earlier.

therefore would best be undertaken by the district court. The evidence supporting petitioners' claims is sufficiently strong that there is good reason to anticipate that it would suffice on remand under a less demanding section 1983 or Title IX standard. The district judge, after all, thought the danger of sexual abuse in instant case was sufficiently manifest as to satisfy even the exceptionally stringent Eleventh Circuit standards.

Although the decision below is not officially reported, it applies two decades of reported Eleventh Circuit section 1983 decisions. Eleventh Circuit cases utilizing that circuit's well-established standards today often are not reported precisely because the precedent is so deeply entrenched. The inter-circuit conflict regarding Title IX is clearly spelled out in a series of officially reported decisions. Within the Eleventh Circuit litigants are expressly permitted to rely on unpublished appellate decisions.[5]

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[5] "[U]npublished opinions may be cited as persuasive authority." 11th Cir. Rule 36, I.O.P. 6. Rule 32.1 of the Federal Rules of Appellate Procedure now provides:

> Citation Permitted. A court may not prohibit or restrict the citation of federal judicial decisions . . . that have been:
>
> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
>
> (ii) issued on or after January 1, 2007.

The decision in the instant case was issued after January 1, 2007.

II. THIS CASE PRESENTS A CLEAR INTER-CIRCUIT CONFLICT REGARDING THE STANDARD FOR EMPLOYER LIABILITY UNDER SECTION 1983

The inter-circuit conflict described in the petition regarding the standard for employer liability under section 1983 involves disagreements about three distinct subsidiary issues. First, the courts of appeals have conflicting views as to the requisite level of notice or knowledge. The varying standards utilized by the different courts of appeals include:

(a) constructive notice

(b) actual notice

(c) actual knowledge

The courts of appeals also disagree about whether the fact that must be known, or the subject of the notice, is:

(a) a risk of constitutional violation

(b) a substantial risk of constitutional violation

(c) a past constitutional violation

(d) a history of widespread constitutional violations

(e) that the subordinate will in fact commit a constitutional violation in the future

The inter-circuit conflict includes as well several quite different standards for assessing the supervisor's

action in the wake of the requisite notice or knowledge:

> (a) failing to take effective action to prevent the constitutional violation
>
> (b) acting with deliberate indifference to the possibility of a constitutional violation
>
> (c) completely ignoring the risk of a constitutional violation
>
> (d) acquiescing in the constitutional violation
>
> (e) approving of the constitutional violation

(Pet. 10-27). The significant number of possible combinations of these variables has given rise to an unusually complex inter-circuit conflict.

In the Eleventh Circuit respondents acknowledged the existence of an inter-circuit conflict regarding the standard of supervisory liability.[6] In this

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[6] In the court of appeals respondents argued that "[s]ection 1983 liability . . . should not apply unless . . . a supervisor has actual notice of the subordinate's constitutional wrongdoing and yet fails to take any action to stop it." (Brief of Appellants/Defendants White County School Dist., et al., p. 23). In a footnote to this assertion respondents correctly observed:

> Some circuits, such as the Fourth Circuit, apply a constructive notice standard to determine supervisory liability. *See Baynard v. Malone*, 268 F.3d 228 ([4]th Cir. 2001). This is a negligence standard; it is, in effect, the standard that the district court applied below. This Court has never taken that approach.

(Continued on following page)

Court, however, respondents seek to dismiss these starkly different standards as mere "language variations," insisting that in practice it would not "matter greatly" which of these formulations the courts use. (Br. Op. 34; see Br. Op. 22 (differences in standards are "semantic")). To the contrary, the choice among such standards is one of the central recurring issues in the law, a question which in various contexts governs not only whether a particular defendant can be held liable but also whether a constitutional violation has occurred at all. This Court has repeatedly granted review to distinguish among these distinct standards.

For example, prior to *Farmer v. Brennan*, 511 U.S. 825 (1994), although all the circuit courts had agreed that certain types of Eighth Amendment violations required proof of deliberate indifference, the "Courts of Appeals had adopted inconsistent tests for 'deliberate indifference,'" 511 U.S. at 832. The Court granted certiorari in *Farmer* "to define the term 'deliberate indifference'" in the Eighth Amendment context. 511 U.S. at 829. Similarly, the "varying approaches" to school district liability under Title IX that prompted this Court to grant review in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), included a conflict as to whether a showing of deliberate indifference could be based on what school

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Id. at 23 n.20. The petition described the Fourth Circuit's adherence to the constructive notice standard. (Pet. 15 and n.16).

officials "should have" known. *Compare Smith v. Metropolitan School Dist. Perry Tp.*, 128 F.3d 1014, 1028-29 (7th Cir. 1997) (refusing to impose liability under Title IX based on showing school officials "should have known" of discrimination) *with Karucunas v. Iona College*, 119 F.2d 80, 88 (2d Cir. 1997) (applying constructive notice standard to Title IX claims) and *Kinman v. Omaha Public School Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (same).

Respondents suggest that past decisions of this Court have already established the standard of supervisory liability in a section 1983 case. (Br. Op. 22, 28, 30, 34). That is not the case. *City of Canton v. Harris*, 489 U.S. 378 (1989), and *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), concerned the standard governing municipal liability under section 1983. *Farmer v. Brennan* determined when official indifference to the safety or medical needs of prisoners violates the Eighth Amendment. *Gebser* and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), decided the standard for imposing liability on school boards under Title IX. *Daniels v. Williams*, 474 U.S. 327 (1986), addressed the degree of culpability that is required to constitute a deprivation under the Due Process Clause. None of these decisions considered when, or even whether, a supervisor could be held liable in a section 1983 action for the conduct of his or her subordinates.

The lines of cases relied on by respondents do not even establish a single standard. *Canton*, which concerns the standard of liability of municipalities

under section 1983, permits imposition of liability based on constructive knowledge. Even if city officials have not actually come to a subjective realization that their policies entail a risk of constitutional violation, the city may still be liable if that risk – although unrecognized – should have been "obvious." 489 U.S. at 390. Several members of this Court noted that this permits the imposition of liability where policymakers were "on actual or constructive notice." 489 U.S. at 396 (O'Connor, J., concurring).

In *Farmer v. Brennan*, 511 U.S. 825 (1994), on the other hand, this Court expressly rejected that *Canton* standard. The issue in *Farmer* was when conduct by prison officials involves the degree of recklessness forbidden by the Eighth Amendment. The petitioner in *Farmer* urged the Court to utilize the *Canton* standard, and to hold that the Cruel and Unusual Punishment clause can be violated where prison authorities should have known of the risk of injury to a prisoner, regardless of the authorities' subjective state of mind. The Court refused to apply the *Canton* standard in that context. "*Canton's* objective standard . . . is not an appropriate test for determining the liability of prison officials under the Eighth Amendment." 511 U.S. 825, 841 (1994). Thus under *Farmer*, but not under *Canton*, a claim will fail if the relevant officials were "unaware . . . of an obvious risk." 511 U.S. at 844.

In the Due Process context yet a different standard may be appropriate. *Daniels v. Williams* held only that injury caused by negligence does not constitute a

"deprivation" of life, liberty, or property. *Daniels* expressly did not resolve whether "something less than intentional conduct, such as reckless or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." 474 U.S. at 334 n.3. It is possible that the Court will ultimately conclude that only intentional conduct, not *Canton* deliberate indifference or *Farmer* deliberate indifference,[7] is the standard under the Due Process Clause.

These decisions are not, as respondents suggest, "closely relat[ed]" to the issue in this case. (Br. Op. 24). The decisions in *Farmer* and *Williams* regarding, respectively, the meaning of the Cruel and Unusual Punishment and Due Process Clauses, have nothing to do with the standard for determining when a supervisor is liable under section 1983 for a violation of the Equal Protection Clause. The decisions in *Gebser* and *Davis* regarding liability under Title IX turned on the

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[7] *Farmer* made clear that "deliberate indifference" can have different meanings in different legal contexts, and that those differences are of substantial importance.

> [W]hile deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability, . . . the "term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents," *Collins v. Harker Heights*, 503 U.S. 115, 124 (1992), a purpose the *Canton* Court found satisfied by a test permitting liability when a municipality disregards "obvious" needs.

511 U.S. at 841.

notice provision of Title IX, 20 U.S.C. § 1682, the absence of an express cause of action in Title IX, and the special principles of statutory interpretation governing Spending Clause legislation. *Gebser*, 524 U.S. at 285-90. The contours of municipal liability under section 1983 derive from the rejection in 1871 of the municipal liability provisions of the Sherman Amendment. *Monell v. Department of Social Services*, 436 U.S. 658, 664-92 (1978). These considerations underlying *Gebser*, *Davis*, *Monell*, and *Canton* have nothing to do with the standard of individual liability under section 1983, which is generally governed by the principles of tort liability that prevailed when section 1983 was enacted in the mid-nineteenth century. *E.g.*, *Pierson v. Ray*, 386 U.S. 547, 554 (1967). This Court's divergent decisions regarding the meaning of "deliberate indifference" are not necessarily relevant; this Court has yet to determine whether some form of deliberate indifference (or some other standard) governs supervisory liability under section 1983.

III. THIS CASE PRESENTS A CLEAR INTER-CIRCUIT CONFLICT REGARDING THE STANDARD OF LIABILITY UNDER TITLE IX

As the petition explains, the courts of appeals are divided as to whether the notice required by *Gebser* is notice of a substantial risk of discrimination forbidden by Title IX, or notice that such discrimination is actually occurring. (Pet. 29-37). Respondents dismiss

this difference as a mere "language variation[ ]" devoid of practical significance. (Br. Op. 34).

But as the instant case plainly illustrates, that difference in standard will often be of controlling importance. The district court below concluded that school officials were on notice that the teacher in question "was engaging in sexually inappropriate conduct with his students" (App. 31), circumstances a reasonable trier of fact could conclude constituted notice of a substantial risk that the teacher would engage in sexual molestation. But the Eleventh Circuit held that notice of such a risk is legally insufficient under *Gebser*, requiring instead that school officials must have had notice that the teacher actually "was sexually molesting students." (App. 7). Similarly, the Third, Sixth, Seventh and Tenth Circuit decisions set out in the petition all permitted imposition of liability under Title IX based on evidence that school officials were aware of the "risk" or "danger" of harassment, molestation, or other discrimination; the claims in those cases would have been dismissed under the quite different standard in the Eleventh and Fourth Circuits.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

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ELEVENTH CIRCUIT CASES UTILIZING "HISTORY OF WIDESPREAD ABUSE" STANDARD

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Mathews v. Crosby, 480 F.3d 1265, 1270 (11th Cir. 2007)

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Gray v. Bostic, 458 F.3d 1295, 1306 (11th Cir. 2006)

Libman v. City of Avondale Estates, 190 Fed. Appx. 774, 777 (11th Cir. 2006)

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